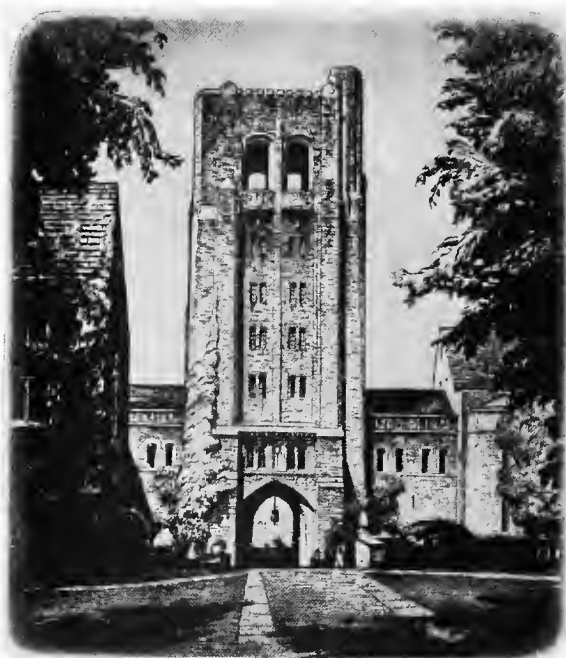




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A DIGEST  
OF THE  
EXAMINATION QUESTIONS  
IN  
COMMON LAW, CONVEYANCING, AND EQUITY,  
FROM  
THE COMMENCEMENT OF THE EXAMINATIONS IN 1836,  
TO THE PRESENT TIME,  
WITH  
ANSWERS;  
ALSO, THE  
MODE OF PROCEEDING, AND DIRECTIONS TO BE ATTENDED TO  
AT THE EXAMINATION.

BY  
RICHARD HALLILAY,  
*Solicitor,*  
*Author of "The Articled Clerk's Handbook," and "A Suit in Chancery."*

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SECOND EDITION.

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LAW TIMES OFFICE :  
19, WELLINGTON STREET NORTH, STRAND. W.C.  
1859.



## PREFACE TO THE SECOND EDITION.



THE First Edition of this work having been exhausted some time ago, and a new edition being called for, I have used every diligence in the preparation of it.

A great part of the First Edition was written before I was admitted, and for my own improvement, and in that rough state went to the printer. In preparing the Second Edition I have re-arranged the divisions, and re-written many of the answers, which greater experience and a more mature judgment have enabled me to improve; and I have carefully revised the whole work. All the new questions asked since the first issue, and their answers, have been added, including those of Trinity Term 1859, which will be found in the Appendix. Many additional references have been given, both to Text-books and decided Cases; and the alterations made by the recent Statutes, including those of last Session, have been carefully noted. But if, after all, some few inaccuracies have crept in, I am sure they will be received with that indulgence which the Law Student is always ready to accord on account of the incessant change and unsettled state of our laws.

Although the length of the answers have been, in some instances, curtailed, yet so many new questions have been added that the bulk of the volume has increased about eighty pages.

It was originally my intention to have incorporated *The Articled Clerk's Handbook* with this edition; but, as that would have so greatly increased the cost of this work, it has been thought advisable

to keep the two distinct, leaving it to the option of the Articled Clerk whether he purchases the two or one.

*The Handbook* is published as an Appendix to the Digest, and is divided into two parts. The first part contains advice on study; how to read; commonplace books; debating societies, &c.; an historical sketch of, and the books to be read in, all the branches of the law. The second contains the latest law relating to Articled Clerks; directions as to giving the notices for examination and admission, and forms for that purpose, and a table of fees payable on admission. A glossary of technical law phrases is added.

R. H.

62, CHANCERY LANE,  
5th November, 1859.



## PREFACE.

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THIS compilation is chiefly designed for the aid of the Articled Clerk in preparing for his Examination. For the present, it is confined to the *three indispensable* heads of inquiry at the examinations—*Common Law, Conveyancing* and *Equity*; the Candidate not being required to answer in the other two—Bankruptcy and Criminal Law. In these three branches is contained a Digest of all the Examination Questions and Answers from 1836 (the commencement of the examinations) to Easter Term 1856. They have been classified and arranged under their proper heads, in order to facilitate, as much as possible, the Articled Clerk in his course of study. The questions on Repealed Law have been omitted, and repetitions of similar questions avoided. Some of the questions have been slightly altered, either to adapt them to the present state of the laws or to correct an obvious error.

The arrangement of the divisions is slightly different from that of the examinations, Conveyancing being put first; for, at the time this portion of the work was written, the Practice of the Courts, under the several Reform Acts, was not very well settled, and more time was thus allowed to elapse before answering the questions relating to the Practice of the Courts.

In writing the answers to the questions, the Author has endeavoured to do so as clearly and concisely as possible, so as to avoid their being meagre on the one hand and verbose on the other; for long rambling answers are more likely to confuse than aid the student.

In citing Authorities for the answers, reference is generally made to some well-known Text-book, where any further information on the subject may be obtained, and where all the authorities are collected, rather than to the Reports themselves, which the Articled Clerk has, in general, no opportunity of referring to.

In the Appendix will be found the mode of proceeding, and directions to be attended to, at the Examination.

And, to make the work more easy of reference, a copious Index is added.

*August 1856.*

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# A DIGEST

OF THE

## EXAMINATION QUESTIONS AND ANSWERS.

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### I.—COMMON LAW.

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#### NATURE OF THE JURISPRUDENCE ADMINISTERED BY, AND DISTINCTIVE JURISDICTION OF, THE COMMON LAW COURTS.

*Question.*—Give some explanation of the words “Common and Statute Law.”

*Answer.*—“The meaning of the term ‘Common Law,’” says Warren, “even among lawyers, is sufficiently ambiguous—the expression being used in various senses, according to the objects with which it is contrasted; it being so contradistinguished sometimes from the statute law, sometimes from the civil and canon law, and frequently from equity:” (see Warren’s Law Studies, 396, 2nd edit.) It is generally, however, used to distinguish that part of our law which obtains its force from immemorial usage or custom, termed the *lex non scripta*; also to distinguish that department of law which is administered in the Superior Courts of Common Law at Westminster: (see Holtb. Law Dict. 2nd edit.; 1 Bla. Com.; 1 Steph. Com. 40, *et seq.*, 3rd edit.) The statute law is termed the *lex scripta*, embracing the express enactments of our parliaments.

*Q.*—State some of the leading acts of Parliament relating to common law passed during the last five years.

*A.*—The following may be mentioned:—The Act relating to the Amendment of Evidence (16 & 17 Vict. c. 83); the Act to compel the Attendance of Witnesses out of the Jurisdiction (17 & 18 Vict. c. 34); the Registration of Bills of Sale Act (17 & 18 Vict. c. 36); the Act for the Repeal of the Usury Laws (17 & 18 Vict. c. 90); the Procedure Act, 1854 (17 & 18 Vict. c. 125); the Bills of Exchange Act (18 & 19 Vict. c. 67); the Mercantile Law Amendment Act (19 & 20 Vict. c. 97); the County Courts Amendment Act (19 & 20 Vict. c. 108); the Act enabling Married Women to pass their Reversionary Interest in Personal Property (20 & 21 Vict. c. 57); the Probate Act (20 & 21 Vict. c. 77); the Divorce Act (20 & 21 Vict. c. 85); the Act for granting a Stamp Duty on certain Drafts or Orders for the Payment of Money (21 & 22 Vict. c. 20); the Act to amend the Law

relating to Cheques or Drafts on Bankers (21 & 22 Vict. c. 79): also Acts to amend the County Courts Act; the Probate Act; the Divorce Act, &c., &c. *Common Law procedure by writs &c.*

**Q.**—Suppose a statute passed repealing a former act, and such statute becomes itself repealed, does the former act become revived?

**A.**—Formerly, in such a case, the former act would have been revived; but now it is provided, by the 13 & 14 Vict. c. 21, ss. 5, 6, that where any act repealing in whole or in part any former act is itself repealed, such last repeal shall not revive the act or provisions before repealed, unless words be added for that purpose: (1 Steph. Com. 78, 3rd edit.)

**Q.**—Is there any separate jurisdiction belonging to each of the Superior Courts of Common Law, not possessed by all the courts in common? If so, state what is the separate jurisdiction possessed by each court.

**A.**—The Court of Queen's Bench possesses a separate jurisdiction in criminal matters, and also a superintending power over the inferior tribunals in the kingdom, not possessed by the other courts. The Court of Common Pleas, or, as it is sometimes called, Common Bench, has exclusive jurisdiction in real actions; also, under the 3 & 4 Vict. c. 74, respecting the fees connected with conveyances executed by virtue of the act; and also with the examination of married women concerning their assurances; also in registration of judgments under 1 & 2 Vict. c. 110, 2 & 3 Vict. c. 11, 3 & 4 Vict. c. 82, and 18 Vict. c. 15. The jurisdiction of this court is altogether confined to civil matters. The Court of Exchequer of Pleas has the exclusive management of revenue matters: (see 3 Steph. Com. 386, *et seq.* 3rd edit.)

**Q.**—State the names of the Superior Courts of Common Law at Westminster. Have they concurrent jurisdiction in personal actions? and if so, has the plaintiff the option of proceeding in either of them?

**A.**—The Superior Courts of Common Law at Westminster are the Queen's Bench, the Common Pleas, and the Exchequer of Pleas; and though they were originally instituted for and possessed peculiar and different jurisdictions, they have now concurrent jurisdictions in *personal* actions, and the plaintiff has the option of proceeding in either of them: (see Smith's Action at Law, 1 to 8, 5th edit.)

**Q.**—What is a court baron, and what a court leet? (a)

**A.**—A court baron is a court incident to every manor in the kingdom, to be holden by the steward within the said manor. It is of two natures: the one is a customary court, appertaining entirely to the copyholders, in which their estates are transferred by surrender and admittance, and other matters transacted relative to their tenures only; the other is a court of common law, and it is the court before the freeholders who owe suit and service to the manor, the steward being rather the registrar than the judge. These courts, though in their nature distinct, are frequently confounded together. The latter may hold plea of any personal action of debt, trespass on the case, or the like, where the debt or damages do not amount to 40s., as well as determine controversies relating to the right of lands within the manor: (3 Steph. Com. 374, 3rd edit.) A court leet is a court of record held once or twice in every

(a) This question would perhaps have been more properly put in Conveyancing.

year within a particular hundred, lordship, or manor, before the steward of the *leet*, for the preservation of peace, and the chastisement of divers minute offences : (4 Bla. Com. 273.)

## ACTIONS, THEIR NATURE, FORMS, AND CHARACTERISTICS.

*Question.*—What is an action?

*Answer.*—An action is the means pointed out by law of obtaining the remedy of a civil injury. It is defined by the *Mirror* to be *the lawful demand of one's right*, and by *Bracton* and *Fleta*, adopting, as in many instances, the language of the Roman law, to be *jus perseguendi in judicio id quod alicui debetur* : (Smith's Action at Law, p. 1, 5th edit.)

*Q.*—Actions are divided into real, personal, and mixed :—What actions are real, what are personal, and what mixed?

*A.*—Real actions are brought for the recovery of real property only. Personal actions for the recovery of personal property, or, as is the more usual case, of damages for some injury. Mixed actions, for the recovery of real property, and also damages against the party detaining it : (Smith's Action at Law, 42, 5th edit.) The only kinds of real actions now in existence are *writ or right of dower*, *dower*, and *quare impedit*, the others being abolished by 3 & 4 Will. 4, c. 27, s. 36; the two first of which are brought by a widow to compel the due assignment of her dower—the difference between the two actions being that the latter is for the specific recovery of the whole of her dower, while the former is for the specific recovery of the residue after she has received part from the tenant; and the last, by a person who complains that he has been improperly deprived of ecclesiastical patronage.

*Q.*—What are the principal causes of actions at common law?

*A.*—They are the following :—1. Detention of debt. 2. For trespass, which may be either to a man's person, or his goods or lands. 3. For libel or slander. 4. For a conversion of goods. 5. For use and occupation. 6. For fraudulent misrepresentation. 7. For false imprisonment. 8. For a private nuisance, or a public one, from which a person has sustained a particular injury. 9. For an excessive or wrongful distress.

*Q.*—What is the distinction between liquidated and unliquidated damages? Give instances of actions in which each species of damages is recoverable.

*A.*—Liquidated damages is where the amount to be recovered is fixed and certain, as in an action for debt. Unliquidated damages is where the amount to be recovered is uncertain; as where an action is brought against a bailee for injury done through his negligence to an article committed to his care. Again, in an action for liquidated damages, the judgment is final, and nothing further is required to be done; but where the action is for unliquidated damages, the judgment is only interlocutory, and the amount must be assessed either on a writ of inquiry or

where the amount is substantially a matter of calculation before a master of the court.

*Q.*—What is an action of assumpsit?

*A.*—Assumpsit is an action which lies for the recovery of damages for the breach of any simple contract. This, in practice, is the form of action adopted in perhaps nine cases out of ten. It lies on bills of exchange, or promissory notes, on policies of insurance, on loans, sales, guarantees, in fact, in almost all the cases which are of most frequent practical occurrence: (Smith's Action at Law, 46, 5th edit.) But, though this action is founded on contract, it may be termed an action on the case: (3 Steph. Com. 452, n., 3rd edit.)

*Q.*—What is an action of covenant?

*A.*—Covenant lies where redress in damages is sought for the breach of a covenant, that is, of an agreement by deed: (3 Steph. Com. *ut supra*.)

*Q.*—What is the difference between an action in assumpsit and debt?

*A.*—One great distinction is, that debt will not lie for the recovery of unliquidated damages, unless secured by a penalty, but assumpsit must be brought: (Lord Raym. 1040; Smith's Action at Law, 45, 5th edit.) If the plaintiff obtain a judgment in action for debt, it is final in the first instance, and nothing more remains to be done; but if assumpsit is brought, the judgment will only be interlocutory, and the amount of damages must be assessed either by a master or on a writ of inquiry. Another distinguishing feature between the two is, that assumpsit will not lie on contracts under seal, but debt will: (Smith's Action at Law, 45, 46, 5th edit.; 3 Steph. Com. ch. vii., 3rd edit.)

*Q.*—Does an action of debt lie upon a deed under seal containing a covenant for payment of a sum certain with interest on a given day that has expired; or to recover principal and interest on a mortgage deed; or for rent upon a lease under seal?

*A.*—In all these cases debt may be brought; but the plaintiff may at his option either bring debt or covenant: (3 Steph. Com. 525, *et seq.* 3rd edit.)

*Q.*—Suppose A. is indebted to B. 100*l.* for goods sold and delivered, in what form or forms of action can B. recover the debt?

*A.*—The form of action may be either debt or indebitatus assumpsit, at the option of the plaintiff: (3 Steph. Com. 526, 3rd edit.; Arch. N.P. 42, 201.)

*Q.*—What is an action of trover?

*A.*—Trover, which is a sort of action on the case, is usually adopted to try a disputed question of property in goods and chattels. It is so called because the old writ, and afterwards the declaration, stated that the defendant found the goods in question and converted them to his own use: (Smith's Action at Law, 44, 5th edit.)

*Q.*—What is the material difference between the action of trover and detinue?

*A.*—In *trover* only the value of the chattel is recoverable: (3 Bla. Com. 153.) In *detinue*, the judgment is for the chattel or its value: (3 Bla. Com. 152; 3 Steph. Com. 519, 3rd edit.) But by the Procedure Act, 1854, sect. 78, execution may issue for the return of the chattel detained, without giving the defendant the option of paying its value;



and if the chattel cannot be found, the defendant's lands and chattels may be distrained until it be returned. The plaintiff, however, may have its assessed value, at *his* option. The defendant might before this act have kept the thing detained on paying its assessed value: (Smith's Action at Law, 44, 5th edit.) And this remedy has been extended to the sale of specific chattels for a price in money, if the judge who tries the cause grants leave: (see 19 & 20 Vict. c. 97.)

**Q.**—Can an action be supported on a lost bond or deed where the loss can be accounted for, and the once existence of the original proved?

**A.**—As the law formerly stood, an action could not have been supported on a lost bond or deed, because *profert* and *oyer* of the bond or deed was necessary; but *profert* and *oyer* being no longer necessary, an action may now be maintained: (see *Read v. Brookman*, 3 T. R. 151; Story's Eq. Jur. § 81, and note; and see also 15 & 16 Vict. c. 76, s. 55.)

**Q.**—Is a civil action maintainable in any case in which the cause of action constitutes an indictable offence?

**A.**—As a general rule, a civil action is not maintainable where the cause of action constitutes an indictable offence, if such offence amounts to a felony, unless the party who seeks to maintain the action has prosecuted the guilty person, when he may obtain restitution: (3 Steph. Com. 483, 3rd edit.; Broom's Legal Maxims, 120, 159, 2nd edit.)

The cases of assault and libel are exceptions to this rule, being only misdemeanors; (*id.*) also the action under 9 & 10 Vict. c. 93 (commonly called Lord Campbell's Act), for compensation in the case of a personal injury resulting in death.

**Q.**—What action must be brought for—1. A libel or slander? 2. A nuisance (as carrying on an unwholesome trade)? 3. Seduction? 4. Non-payment of a bill of exchange or promissory note? 5. The recovery of possession of a house?

**A.**—For libel or slander the form of action is on the case: (3 Steph. Com. 465, 469, 3rd edit.) For a nuisance of the kind specified an action on the case is the proper remedy: (*id.* 564.) For seduction an action of trespass, or on the case, may be brought: (*id.* 536.) For nonpayment of a bill or note, assumpsit may be brought; and if there be a privity between the parties to the suit, debt may be sustained: (*id.* 529.) For the recovery of possession of a house ejectment is brought. There is also a summary remedy in the County Courts, and before a magistrate: the remedy in the County Court is more extensive than before a magistrate under 1 & 2 Vict. c. 74, and therefore more generally resorted to, but the amount of the yearly value or rent of the house is not to exceed 50*l.*, and it only applies in cases between landlord and tenant upon the ending of the term, or interest of the tenant: (9 & 10 Vict. c. 95, s. 122, *et seq.*; 19 & 20 Vict. c. 108; Arch. New C. L. Pract. 6, 2nd edit.)

**Q.**—How is a contract by matter of record to be enforced?

**A.**—A contract by matter of record is generally enforced by action of debt: (see Steph. Com. 530, 3rd edit.)

**Q.**—How are contracts under seal to be enforced?

**A.**—Contracts under seal are enforced either by action of covenant or debt. Covenant will lie in every case of an agreement under seal, and where the damages are unliquidated it is the only remedy; as for a

breach of a covenant in a lease on the part of the tenant to repair: (see 3 Steph. Com. 524, 525, 3rd edit.)

**Q.**—Mention some of the causes of action which do not survive to executors.

**A.**—It is a maxim of the common law that a personal right of action dies with the person—*actio personalis moritur cum persona*. There are, however, now several statutory exceptions to this rule: by the 4 Edw. 3, c. 7, executors may bring an action for trespass to the goods and chattels of their testator; and by the 3 & 4 Will. 4, c. 42, s. 2, this remedy is extended to injuries done to the real estate of any person deceased, committed within six months before his death, and provided the action be brought within one year after his death.<sup>1</sup> Notwithstanding, however, the statutory exceptions above noticed, to the general rule which was recognized by the common law, this rule still applies where a tort is committed to a man's person, feelings, or reputation, as for assault, libel, slander, or seduction of his daughter: in such cases no action lies at the suit of the executors or administrators, for they represent not so much the person as the personal estate of the testator or intestate, of which they are in law the assignees. As to executors and administrators suing when death is caused to their testator or intestate by the wrongful act of another, see 9 & 10 Vict. c. 93, and *post*, tit. Torts, &c.: (Broom's Leg. Max. 702 to 708, 2nd edit.)

**Q.**—State the forms of actions founded on tort, and state what is the gist of each action.

**A.**—The forms of actions founded on tort are the following:—1. Trespass. 2. Case. 3. Trover. 4. Detinue. 5. Replevin. 6. Ejectment.

The gist (or foundation—see Holth. Law Dic. 2nd edit.) of the action of trespass is the immediate violence with which the injury is accompanied; case, the consequential injury resulting from the tort: trover, the wrongful conversion of goods and chattels; detinue, the wrongful detention; replevin, the illegal taking and detaining of goods and chattels; and the gist of ejectment is the improper withholding of land: (see 3 Steph. Com. 448, *et seq.* 3rd edit.)

**Q.**—State the distinction between actions of contracts and of torts.

**A.**—Personal actions are founded either on *contracts or torts*, a term used to signify such wrongs as are in their nature distinguishable from breaches of contract; and these torts are often considered as of three kinds, viz., *nonfeasance*, or the omission of some act which a man is bound to do; *misfeasance*, being the improper performance of some act which he may lawfully do; or *malfeasance*, being the commission of some act which is unlawful. The action of trespass or of case is founded on tort; while covenant or debt is founded on contract: (3 Steph. Com. 452, 3rd edit.; Paterson and Mac. Com. Law Pract. 68.)

**Q.**—What is the meaning of a *local* and of a *transitory* action? and what actions are local and what transitory?

**A.**—*Local* actions are founded on such causes of action as necessarily refer to some particular locality, as in the case of trespass to land; while *transitory* actions are founded on such causes of action as may be supposed to take place anywhere, as in the case of trespass to goods. Real actions are always in their nature local; personal actions are, for the most part, transitory. And there is also this important distinction between them—local actions must (unless otherwise specially ordered by

the court or a judge) be tried in the county in which the cause of action arose, and by a jury of that county; while transitory actions may be tried in any county, at the discretion (in general) of the plaintiff: (see 3 Steph. Com. 463, 1st edit.; 454, 465, 3rd edit.)

**Q.**—State what actions of common law are founded on contract, adding whether they are respectively local or transitory.

**A.**—The actions of assumpsit, debt, and covenant are founded on contract, and are transitory actions: (Smith's Action at Law, 46, 97, 5th edit.; 3 Steph. Com. 461, *et seq.*, 3rd edit.) The actions of account and annuity are also founded on contract, but the former is almost, and the latter quite, obsolete: (Smith's Action at Law, 46, 5th edit.)

**Q.**—Is it compulsory on a defendant to set-off his claim against the plaintiff's demand in an action brought by the plaintiff? or can he bring his action for the amount of his set-off?

**A.**—It is not compulsory on the defendant to set-off his claim against the plaintiff's, but it is generally advisable for him to do so. He may, however, bring his action for the amount of his set-off; (*Baskwell v. Browne*, 2 Burr. 1229.)

**Q.**—Jones and Wilkinson bring an action against Bennett to recover 100*l.* due from him to them jointly. Wilkinson alone owes Bennett 50*l.* Can Bennett set-off this 50*l.* in the action against him? and if not, why not?

**A.**—If Jones and Wilkinson bring an action against Bennett to recover 100*l.* due to them jointly, and Wilkinson owes Bennett 50*l.* Bennett cannot set-off this debt of 50*l.* against the joint debt sought to be recovered against him because the debts are not mutual, which is one of the essentials necessary to set-off one debt against another: (see Arch. N. P. 124.)

**Q.**—What sort of counter claims can be set-off in actions between the same parties in actions of contract, and what cannot?

**A.**—They are the following:—The debts must be mutual; the subject of set-off must be a legal and not a mere equitable debt, or claim sounding in damages, and the debt must be subsisting; therefore a debt which is barred by the Statutes of Limitations cannot be set-off; and the debt must be actually due and payable at the commencement of the action: (see 2 Geo. 2, c. 22; 8 Geo. 2, c. 24; Arch. N. P. 122 to 126.)

## THE LAW OF CONTRACTS.

**Question.**—How many descriptions of contracts are there?

**Answer.**—There are three. 1. By matter of record. 2. Under seal. 3. Simple contracts, that is, not under seal.

**Q.**—What is the difference between simple contract and specialty debts?

**A.**—Simple contract debts are such as are not under seal, nor does the obligation arise by matter of record, but by writing, not under seal, or by mere oral evidence. Specialty debts are such as have become due by matter of record, or by instrument under seal. Another difference between simple contract and specialty debts is, that the former are not

valid unless founded on a sufficient consideration, and do not, when in writing (with the exception of bills and notes), import a consideration. But where a security is under seal, it is binding on the party executing it, although there be no consideration for making it: (2 Steph. Com. ch. v., 3rd edit.; Smith's Mercantile Law, 267, 5th edit.) Another difference is, that in administering legal assets a specialty debt has priority over a simple contract debt: (Matthew's Guide to Exors. & Adms. 154, and note, 2nd edit.)

Q.—What is an executory contract?

A.—An executory contract is one that is to be executed at a future time, as if A. and B. agree to exchange horses next week; in such case the right only vests, the property not being in possession, but in action only: (2 Steph. Com. 3rd edit.)

Q.—How are contracts divided with reference to evidence?

A.—This question is somewhat ambiguously framed. Contracts with respect to evidence may be said to be divided into contracts in writing and contracts not in writing, and as to contracts in writing, those which are under seal and those not under seal. It is a rule that parol evidence cannot be received to contradict, vary, add to, or subtract from the terms of a valid written instrument. Also, that a deed,—that is, a writing under seal,—cannot be altered, or the liability created by it lessened or discharged, by an instrument under hand only, or by any subsequent contract in writing not under seal: (see Addison on Cont. 388, &c., 4th edit.)

Q.—Is an infant liable for any debts? and if so what debts?

A.—An infant is liable for *necessaries* supplied to him, as meat, drink, apparel, medicines, and other necessaries suitable to his station in life: (Co. Lit. 172, a.; 2 Steph. Com. 115; Chitty on Cont. 136, 4th edit.)

Q.—Is there any, and what, restriction to a husband's liability for the debts of his wife contracted before marriage?

A.—A husband during the continuance of the marriage is liable *jointly* with his wife upon all the contracts entered into by her *before* the marriage, however improvident; and the circumstance of his having no fortune with her does not make any difference. But upon her death he is no longer liable as husband; and unless he administer (in respect to *choses in action* not reduced into possession in her lifetime) he cannot be sued at all; if he administer, however, he will be liable to the amount of the sums received by him on account of the *choses in action*, but not further, even though he received a large property with the wife.

Q.—When is a husband liable for the debts of his wife contracted during coverture, and in what cases is he not liable?

A.—A husband is bound to maintain his wife, and is liable for her contracts made for the sole purpose of supplying herself with necessaries suitable to her station in life, upon the principal of her being his agent, though not binding upon herself: (Broom's Legal Maxims, 663, 2nd edit.) For if they be living together, his consent to such contracts will ordinarily be presumed, though this presumption may be repelled by special circumstances, as by notice to the particular tradesman not to trust her, or if the order be excessive in point of extent, and such as the husband would not have authorized: (*Montague v. Benedict*, 3 B. & C. 634.) And he is in general liable on her contracts for necessaries, not only while they are living together, but even after a separation, if no pro-



vision be made for her; for the tradesman is then considered (even though he has notice not to trust her) as standing in her place, and as enforcing indirectly her right to be maintained. But the husband is not liable for money lent to the wife to purchase necessaries. So, if the wife departs from her husband against his will, and without sufficient excuse, arising from his illtreatment, or if she is dismissed by him for adultery, the husband incurs no such liability. So, if husband and wife are living separate and apart, and the husband allows her a sufficient sum for her maintenance, which is regularly paid, this is sufficient to repel the inference of agency, and he is not liable for any debt she may contract; and it is not necessary that there should be any deed of separation; but the allowance must be such as the jury shall think sufficient; reference being had to the station of the parties, and the income of the husband: (*Holder v. Cope*, 2 Car. & K. 437.) It is immaterial whether the tradesman knew of such allowance or not. And if a wife living apart from her husband orders goods to be sent to a third person, and they be so sent to the house of such third person, that not being the abode of the wife, the husband is not liable to pay for the goods: (*Reeve v. The Marquis of Conyngham*, 2 Car. & K. 444; and see generally, 2 Steph. Com. 250 to 252, 2nd edit.) *Manby v. Scott*, 1 Lev. 4; S. C., 1 Sid. 109; *Montague v. Benedict*, 3 Bar. & C. 631; *Seaton v. Benedict*, 5 Bing. 28, are the leading cases on the subject of the husband's liability.

Q.—What rights as to property have been conferred by recent legislation upon wives deserted by their husbands, and how may they be secured?

A.—By sect. 21 of the Divorce Act, a wife deserted by her husband may, at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or if resident in the country, to justices at petty sessions, or in either case to the court, for an order to protect any money or property she may acquire by her own industry, and property she becomes possessed of after such desertion, against her husband and his creditors, or persons claiming under him; and if such magistrate, justices, or the court be satisfied of the fact of desertion, and that it was without reasonable cause, and that the wife is maintaining herself by her own industry or property, an order may be made protecting her earnings and property acquired since the desertion, from the husband and all creditors and persons claiming under him, and such earnings and property belong to the wife as if she were a feme sole. The order must, if made by a police magistrate, or justices at petty sessions, be entered within ten days after the making, with the registrar of the County Court within whose jurisdiction the wife is resident. The husband may, however, apply to have the order discharged. If the husband, or person claiming under him, seizes and continues to hold property of the wife after notice of the order, he is liable at the suit of the wife to restore the property, and also for a sum double the value of the property so seized or held after such notice. During the continuance of the order the wife is considered, in all respects, as a *feme sole*: (20 & 21 Vict. c. 85; and see 30 L. T. 248.)

Q.—Name the contracts required by the 4th section of the Statute of Frauds to be in writing.

A.—In the following cases the 4th section of the Statute of Frauds requires that there shall be some note or memorandum of the agreement in writing, signed by the party to be charged therewith, or some other

person thereunto by him lawfully authorized, before any action can be brought upon the agreement :—1. Where an executor or administrator promises to answer damages out of his own estate. 2. Where a man undertakes to answer for the debt, default, or miscarriage of another. 3. Where any agreement is made upon consideration of marriage. 4. Where any contract is made of lands, tenements, or hereditaments, or any interest therein. 5. Where there is any agreement that is not to be performed within a year from the making thereof: (29 Car. 2, c. 3, s. 4.)

Q.—What is the nature of a guarantee?

A.—A guarantee is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is himself in the first instance liable to such payment or performance: (see Smith's Merc. Law, 438, 5th edit.)

Q.—Describe the legal incidents of a guarantee.

A.—The guarantee must be in writing and signed by the party to be charged, or his lawful agent; otherwise it cannot be *sued upon* (29 Car. 2, c. 3), and there must be a *consideration* and a *promise*. The consideration, however, need not appear in the writing (19 & 20 Vict. c. 97, s. 3), as was formerly necessary in accordance with the Statute of Frauds: (see Smith's Merc. Law, tit. "Guaranties," 5th edit., and *post*.)

Q.—Must a guarantee for a third party be in writing, or will a verbal promise be sufficient?

A.—It is provided by the Statute of Frauds that no action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized. As will be seen, this section prevents a *verbal* guarantee from being *sued upon*; though it is to be observed, that if money have been paid in pursuance of it, that money cannot be recovered back. And if a party admit that he has made a binding guarantee by paying money into court on a count charging him with it, that renders proof of a written instrument unnecessary: (see Smith's Merc. Law, 438, 5th edit.)

Q.—In a guarantee on behalf of a third person must any consideration be stated, and how, and of what kind should it be? (a)

A.—In a guarantee on behalf of a third party formerly a consideration must have appeared in the writing; but by the 19 & 20 Vict. c. 97, it is enacted that no special promise to be made by any person to answer for the debt, default, or miscarriage of another being in writing shall be deemed invalid to support an action, &c., to charge the person signing the promise by reason only that the consideration for such promise does not appear in the writing, or by necessary implication from a written document: (see sect. 3.) As to the kind of consideration, in general any act of the nature of a benefit to the person promising, or any act which is a detriment to him to whom the promise is made, is sufficient. It was sufficient however, formerly, if the consideration could be gathered wholly from the whole tenor of the writing; not that a mere *conjecture*,

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(a) This question has also been asked in the following form :—Must a contract to pay the debt of another be in writing? and must the consideration be expressed on the face of the instrument?

however plausible, would be sufficient to satisfy the statute, but there must have been a well grounded inference to be necessarily collected from the terms of the memorandum: (see *Smith's Merc. Law*, tit. "Guarantees," 5th edit.)

Q.—Should you advise that an action would lie upon the following guarantee:—To A. B. I agree to pay for whatever goods you shall sell to C. D., in case of his making default in the payment thereof. E. F.?

A.—There being a consideration and a promise I should advise an action to be brought: (see *Smith's Merc. Law*, *ut supra*.)

Q.—Will a moral obligation be sufficient to support an express promise where no legal liability ever existed?

A.—No; courts of law do not take upon themselves to enforce moral obligations where no legal liability ever existed: (see 1 Arch. N. P. 77, and the authorities there cited.)

Q.—State some of the most prominent rules by which contracts not under seal are to be construed.

A.—They are the following:—A contract not under seal must be made upon a consideration; that is, there must be some compensation or *quid pro quo* to be reciprocally afforded by the promisee, or it will be a *nudum pactum*, on which no action will lie; but any degree of reciprocity, whether in the way of benefit bestowed by the promisee or disadvantage sustained by him, will prevent the pact from being nude, adequacy of consideration not being entertained generally. And if either the consideration or the promise founded upon it is *illegal* (whether as contrary to the express provisions of the law or against its policy), or of an *immoral* or fraudulent character, the contract is utterly void and of no effect. Another rule is, that the consideration of a promise must move from the promisee; *i. e.*, it must be an act to be performed on his part or by his procurement, and not on the part or by the procurement of a stranger. The contracts of infants and insane persons are not binding, except for necessities suitable to their station in life; but an infant may confirm his contracts on attaining twenty-one. Neither can a married woman in general contract, though she may to a certain extent bind her husband: (see 2 Steph. Com. 49, *et seq.* 3rd edit.; Broom's Max. 583, *et seq.* 2nd edit.)

Q.—State some of the maxims by which contracts are expounded.

A.—The following are some of the maxims by which contracts are expounded:—Oral testimony cannot be received to contradict, vary, add to, or subtract from the terms of a valid written contract. But oral evidence may, in all cases of doubt, be received to *explain* a written instrument; as where the language of the instrument is susceptible of two or more meanings. No deed can be altered or the liability created by it be lessened or discharged by an instrument under hand only, or by any subsequent contract in writing not under seal. As above stated, a contract not under seal must have a consideration to support it; but where a security is under seal it is binding on the party executing it, although there be no consideration for making it: (see Addison on Cont. 888, *et seq.* 4th edit.)

Q.—When the Statute of Frauds requires an agreement to be in writing, is it necessary that the consideration should appear on the agreement, or may it be supplied by parol testimony?

A.—The following agreements required by the Statute of Frauds to be in writing, must disclose the consideration for the promise or agreement :—A special promise by an executor or administrator to answer damages out of his own estate ; an agreement made upon consideration of marriage ; a contract of sale of lands or hereditaments or any interest in or concerning them ; an agreement that is not to be performed within one year from the making thereof ; (and prior to the 19 & 20 Vict. c. 97, also a special promise to answer for the debt, default, or miscarriage of another ; and the omission to state the consideration cannot be supplied by oral testimony.) So the memorandum of a bargain for the sale of goods must state the price to be paid, if the price was fixed at the time of the making of the contract ; but if no price was definitely fixed the memorandum of sale will be sufficient in the case of a chattel, without any statement of price, and the law will infer that a reasonable price was to be paid : (see Addison on Cont. 41, 42, 4th edit.)

Q.—Can you question the legality of a consideration to a contract under seal ?

A.—Although, as a general rule, a contract when under seal is binding on the party making it, whether there be a consideration or not, yet all deeds are liable to be impeached if founded on illegal or immoral considerations, or if obtained by fraud : (see 1 Steph. Com. 462.)

Q.—A. B., in the presence of a witness, makes a representation concerning the character of a third party, upon which credit is given to the latter ; such representation proving false, can an action be successfully maintained against A. B. ?

A.—No ; for by 9 Geo. 4, c. 14 (commonly called Lord Tenterden's Act), it is enacted, "that no action shall be brought to charge any person, by reason of any representation or assurance made or given concerning or relating to the conduct, credit, ability, trade, or dealings of any other person, to the intent or purposes that such other person may obtain credit, money, or goods upon, (a) unless such representation or assurance be made in writing signed by the party to be charged therewith."

Q.—In what way, other than by a memorandum in writing, can a person render himself liable for the debts of another ?

A.—Where a third person accompanies another who orders goods which the seller refuses to give the latter credit for, and the third party promises to pay for them, his *verbal* promise is sufficient to render him liable ; the goods being in fact *sold* to the third party, although delivered to the other. But if the party who orders the goods be treated by the seller as the debtor, a verbal promise by a third party will not render him liable. The question is, *to whom was credit given ?* and this must in general be decided by a jury : (see Smith's Mercantile Law, 443, 5th edit.)

Q.—How should a person who has delivered goods to a common carrier to carry and deliver, but which have not reached their destination, proceed for the recovery of damages ?

A.—The ordinary remedy against a common carrier for damages for loss or injury to goods, is either by action of *assumpsit* or on the *case* ; or *detinue* may be brought ; and where the carrier has been guilty of a

(a) Sic in the statute.

misfeasance which amounts to a conversion, trover may be maintained: (1 Arch. N. P. 59, 393, 538, 576.)

Q.—State the instances, if any, in which a carrier is not liable for the loss of goods entrusted to him, and for what losses he is liable.

A.—A common carrier is not liable for a loss arising from the act of God, or of the Queen's enemies. In other cases, even his entire faultlessness does not excuse him: thus, he is liable for damage done by accidental fire or by a robbery. The stat. 1 Will. 4, c. 68, s. 1, however, protects a common carrier by land from being liable for any loss or injury to any gold or silver coin, gold or silver in a manufactured or unmanufactured state, precious stones, jewellery, watches, clocks, notes, bills, title deeds, pictures, glass, &c., contained in any parcel, where the value exceeds the sum of 10*l.*, unless at the time of the delivery to the carrier their value and nature be declared, and an agreement made to pay the extra charge for them, as provided by sect. 2 of the above act. By sect. 5 every office of such common carrier shall be deemed a receiving house for the purposes of the act. This act does not protect any common carrier from liability to answer for losses or injury arising from the *felonious* acts of any servant in his employ. And special agreements are not affected by this act: (see Smith's Merc. Law, 285, *et seq.* 5th edit.) Carriage by railway is governed by the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), which provides that the company shall be liable for loss or injury to any goods occasioned by the neglect or default by the company or its servants, notwithstanding any notice, condition, or declaration by such company contrary thereto, or in anywise limiting their liability. But they may limit their liability by express condition, to be approved of by the judge who tries the cause. It is also declared that no greater sum shall be recovered for a horse than 50*l.*, meat cattle per head, 15*l.*, sheep and pigs, 2*l.* per head, unless when such cattle are delivered to the company they are declared to be of a higher value, in which case a higher rate of duty may be charged for carriage. Special agreements are not affected by this act. So the stat. 1 Will. 4, c. 68, applies to railways.

Q.—The property of a traveller at an inn is stolen by some person unknown, without any imputation of connivance or neglect in the landlord or his servants. Is the landlord liable to make good the loss?

A.—Yes; for the rule as to the liability of an innkeeper is, that he is responsible for the goods and chattels brought by any traveller to his inn, in the capacity of guest there, in every case where they are lost, stolen, or taken by robbery, except where they are taken by the Queen's enemies, or are stolen by the traveller's own servant, or companion, or from his own person, or from a room which he occupied otherwise than as a mere guest, or from his own gross negligence: (see *Catye's case*, 8 Rep. 32; 1 Arch. N. P. 100, 574.) It has been decided that an hotel-keeper is an innkeeper so as to be liable for a loss of goods. It has also been held that a house of public entertainment in London, where beds, provisions, &c., are furnished for all persons paying for the same, but which was merely called a tavern and coffee-house, and was not frequented by stage coaches or waggons from the country, is to be considered as an inn, and the owner subjected to the same liability as innkeepers: (*Thompson v. Lacy*, 3 B. & Ald. 283.)

Q.—Where a traveller is preparing to depart from an inn without paying his bill, may the landlord detain either his person or baggage until payment?

A.—An innkeeper cannot detain the person of his guest until payment of his bill, but he has a lien on goods intrusted to his charge by his *guest*, and may detain them, though they belong to another: (see Smith's Merc. Law, 535; and note (f), 5th edit.)

Q.—A traveller on his journey stops at an inn, and desires to put up for the night; the landlord, although he has room in his house, refuses to receive him. Is or is not the landlord warranted in so doing; and if not, has the traveller any and what remedy against the landlord for such refusal?

A.—An innkeeper is bound to receive a traveller into his house, and to find him with reasonable accommodation upon his tendering him a reasonable price for the same; and if he fail therein the traveller or guest may have his remedy by an action on the case: (1 Arch. N. P. 100, 574; Chitty on Cont. 414, 4th edit.; and see *Fell v. Knight*, 10 L. J. 277, Ex.)

Q.—In an action on the warranty of a horse, would an implied warranty be sufficient upon which to maintain an action? Does a sound price amount to a warranty?

A.—An implied warranty would not be sufficient to maintain an action, it must be an express one; but if there be no express warranty, and a deceit is knowingly practised on the purchaser, the seller would be liable to an action on the case. A sound price does not amount to a warranty: (see Smith's Merc. Law, 489, *et seq.* 5th edit.; 2 Steph. Com. 67, 2nd edit.)

Q.—Describe the nature of a *chose in action*.

A.—A *chose in action* is a phrase which is sometimes used to signify a right of bringing an action, and at others the thing itself which forms the subject matter of that right, or with regard to which that right is exercised. But it more properly includes the idea, both of the thing itself, and of the right of action as annexed to it. Thus, money due on bond is a *chose in action*; for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law: (see 2 Steph. Com. 11, 2nd edit.; Holth. Law Dic. 2nd edit.)

Q.—A. enters into a bond to B. in the penal sum of 1000*l.* conditioned for payment of 500*l.* and interest; B. assigns the bond to C. A. does not pay his bond, and it becomes necessary to sue him. In whose name should the action against A. be brought? and state the reason for your answer.

A.—The action must be brought in B.'s name; for the bond is a *chose in action* which, with the exception of bills of exchange and promissory notes, and assignments by operation of law, as bankruptcy and insolvency, cannot be assigned at law. But such assignments are recognised in equity: (2 Steph. Com. 39, 2nd edit.)

Q.—What is a bond? Describe a common money bond.

A.—A bond or obligation is a deed whereby a person binds or obliges himself, his heirs, executors and administrators, to pay a sum of money or do any other act within a certain time. There is usually also added what is termed a *condition*, which is simply a statement of the condition which the obligor subjects himself to in the bond to which it is annexed: (Holth. Law Dict. 2nd edit.) A common money bond acknowledges that

the obligor is bound to the obligee in *double* the amount of the debt. The condition states that on payment of the sum really due, with interest, on a certain day the bond is to become void.

**Q.**—A gentleman is in the habit of sending his servant to a shop and receiving goods on credit: the servant misapplies some of the goods to his own use. Has the seller a remedy for the value of the goods so misapplied against the master? The same servant also obtains goods on credit in his master's name, of a tradesman who had never before had dealings with the master, and takes the goods to his own use. Can the tradesman recover the value against such master?

**A.**—In the first case put the master is liable, and the seller may have his remedy for the value of the goods against him; for he who accredits another by employing him, must abide by the effects of that credit; since, where one of two innocent persons must suffer by the fraud of a third, he who enabled the third person to commit the fraud, must be the sufferer. In the second case the master is not liable, he having given the servant no power to contract on credit, either express or implied: (see Smith's Merc. Law. 134, 135, 5th edit.)

**Q.**—Must a contract to purchase a horse be in writing? How would it be if a warranty were given with the horse: must that be reduced to writing?

**A.**—If the price paid for the horse is 10*l.* or upwards the contract must be in writing, for it falls within the 17th section of the Statute of Frauds; which enacts that no contract for the sale of any goods, wares, or merchandise for the price of 10*l.* or upwards shall be allowed to be good except the buyer shall accept part of the goods sold, and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum of the same bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised: (29 Car. 2, c. 3, s. 17.) It is not necessary that a warranty should be in writing; but if there is a contract in writing the warranty as to soundness should be stated: (see Smith's Merc. Law, 489, *et seq.* 5th edit.)

**Q.**—A servant's wages are payable quarterly, and have been paid to Lady-day, 1844. Between Lady-day and Midsummer, 1844, namely, on the first of May, the servant misconducts himself, and for such misconduct is turned away by his master without warning. Is the servant entitled *pro ratâ* to wages from Lady-day to May?

**A.**—No; and the master will be justified in taking this step by any exhibition of moral turpitude on the part of the servant, *ex. gr.*, an assault on a maid-servant, or the persuasion of an apprentice to elope, or by a refusal to obey his lawful orders: (see Smith's Merc. Law, 409, 5th edit.)

**Q.**—What is the law as to the payments of the debts of relations and third parties?

**A.**—The law is the same; a person being a relation does not entitle him to any preference.

**Q.**—What is the meaning of a *del credere* commission, and what liability does a factor incur by the receipt of a *del credere* commission?

**A.**—The name *del credere* commission has been taken from an Italian mercantile phrase signifying *guarantee*, and by which the factor for an additional premium beyond the usual commission, when he sells goods on credit, becomes bound to warrant the solvency of the purchaser. It was

at one time thought that the agent acting under a *del credere* commission was liable to his principal in the first instance, but it is now settled that he is only a surety, liable in case of the default of his buyers : (see Smith's Merc. Law, 129, 5th edit.)

*Q.*—Explain briefly the terms *charter party*, *general average*, *stoppage in transitu*.

*A.*—A charter party is an instrument commonly called among merchants and seafaring men a *pair of indentures*, and contains the covenants and agreements made between them concerning their merchandise and maritime affairs : (Holth. Law Dic. 2nd edit.) Or it may be more briefly explained to be the instrument of freightage, or articles of agreement for the hire of a vessel. *General average* is a term used in maritime commerce to express the contribution made by the owners of a ship, and the proprietors of goods on board, to those persons who, for the preservation of the ship and for the goods and lives on board have sacrificed their own property by casting it into the sea : (Holth. Law Dic. 2nd edit. ; 1 Park Ins. 160, *et seq.*) *Stoppage in transitu* is that right which the law gives the vendor in certain cases to reclaim goods previously sold while on *their way* to the purchaser. This right arises where the goods having been sold on credit the vendor ascertains, before the goods reach the purchaser's hands, that he has become insolvent or bankrupt : (Smith's Merc. Law, 524, 5th edit.)

*Q.*—What will constitute a partnership with regard to third parties ?

*A.*—Where two or more persons agree to combine property or labour for the purpose of a common undertaking and the acquisition of a common profit, they are partners liable to third parties. And they will all be liable to third parties, even though one of them may, as between themselves, stipulate to be free from loss. And a man may, without entering into any contract, impose on himself the liabilities of a partner with regard to third persons ; for if any one lends his name and credit to a firm, and, as the phrase is, holds himself out to the world as a partner therein, he is liable for its engagements, and that whether he has any real interest in the firm or not : (see Smith's Merc. Law, 19, 23, 5th edit.)

*Q.*—State the general rules regulating the liability of partners for the acts of each other.

*A.*—It is a general rule that each partner is liable for the acts of the other partners. Thus, one partner may bind the firm by *simple contract* relating to the partnership, either in the way of sale, purchase, pledges, assignment, loan, or by any other acts, which are ordinarily incident to the trade or business ; as, by bill or note, or receipt ; and may even give a *valid release by deed*, but he cannot in other cases bind the firm by *deed* unless he have express authority by deed for that purpose, nor by submission to arbitration. So, in some cases of tort by one partner, the others would be liable, as, damage done by running down a ship. But in no cases of fraud will the acts of one partner bind the others where there is collusion between him and the party with whom he deals. And, as an entire firm may be bound, so it may be discharged by the transactions with a single partner : thus, payment or satisfaction of a debt by one partner is payment or satisfaction by them all, so a release or discharge to one is a release to all : (see Smith's Merc. Law, tit. "Partners," 5th edit.)



## BILLS OF EXCHANGE, PROMISSORY NOTES, AND CHEQUES.

*Question.*—Define a bill of exchange.

*Answer.*—A bill of exchange is a written order from A. to B., directing B. to pay to C. or A., or his order, a sum of money therein specified. A. is called the drawer (and when payable to him or his order also payee); B. the drawee, and when he accepts the acceptor, and C. the payee.

*Q.*—Define a promissory note.

*A.*—A promissory note is a promise or engagement in writing to pay a specified sum at a time therein limited, or on demand, or at sight, to a person therein named or to his order, or to the bearer. The person who signs the note is called the maker: (see Byles on Bills.)

*Q.*—Define a cheque. What is the effect of “crossing” a cheque?

*A.*—A cheque is in effect a bill of exchange drawn on a banker, payable to bearer on demand. The effect of crossing a cheque is to make it payable only to or through some banker: (see 19 & 20 Vict. c. 25.)

*Q.*—Describe the parties to a bill of exchange, and state their relative liabilities.

*A.*—The parties to a bill of exchange are, as above stated, the *drawer*, to whom the amount of the bill is owing from the party to whom it is addressed, called the *drawee*, before acceptance, but after he has accepted he is termed the *acceptor*, and the person to whom the money is to be paid, is called the *payee*, who may be either the drawer or a third party. There are generally also, that is, when the bill is made payable to order, other parties, who are *indorsers* of the bill, the holder in such case being the *indorsee*. The acceptor is primarily liable, and is the principal, all the other parties being merely sureties for him, liable only on his default. But though all the other parties are in respect of the *acceptor* sureties only, they are not as *between themselves* merely co-sureties, but each prior party is a principal in respect of each subsequent party: (Byles on Bills, c. 1; Smith's Merc. Law, 208, &c., 5th edit.) A person indorsing a bill undertakes the payment thereof, and is considered as a new drawer, unless he qualify his indorsement, as by adding the words “*sans recours*,” or without recourse to me; which is the proper mode of indorsement by an agent: (Byles on Bills; Smith's Merc. Law, 5th edit.)

*Q.*—Is there any difference in the extent of the liability of an acceptor of a bill of exchange as between himself and third parties, and as between himself and the drawer?

*A.*—In ordinary cases there is no difference in the extent of the liability of an acceptor as between himself and a drawer, and himself and third parties. For, as already seen, the acceptor is the party primarily liable to pay the bill in both cases; though in the latter the other parties to the bill may likewise be liable: (see Byles on Bills, 182, 183, 4th edit.) If, however, there has been no consideration for the acceptance, then the acceptor is not liable to the *drawer*, though he is to parties who took the bill *bonâ fide* and paid a valuable consideration for it. So the acceptor may, as against the drawer, but not as against *bonâ fide* holders for value, show a partial want of consideration, and the drawer

shall only recover to the extent of the real consideration : (see Smith's Merc. Law, 267, 268, 5th edit.) (a)

*Q.*—If the acceptor of a bill of exchange refuse payment of it when due, is any and what step necessary before you can sue the drawer or indorser ?

*A.*—Yes ; notice of such refusal (or, as it is called, notice of dishonour) must immediately be given to any party to it, to whom the holder wishes to have recourse. There is no particular form of notice, yet it must impose in express terms, or by necessary implication, that the bill or note *has been dishonoured* ; the notice should also ascertain the instrument ; but an inaccuracy in the description of it, by which the party cannot be misled as to the bill intended, is immaterial : and so is an error as to the place where the bill is lying. A written notice is not essential : (Smith's Merc. Law, 251 to 257, 5th edit.)

*Q.*—Within what time ought notice of the dishonour of an inland bill accepted for value to be given to the drawer or indorser by the holder ?

*A.*—Where the holder and the party to whom notice is addressed live at different places, it is sufficient to send off notice on the day next after the day of dishonour. Where both the parties live in the same town, or where they live in London, notice must be given in time to be received in the course of the day following the day of dishonour. A person receiving a notice of dishonour need not transmit the notice to anterior parties until the next post after the day on which he receives notice : (see Byles, on Bills, 213 to 215, 4th edit. ; Smith's Merc. Law, 258, 5th edit.)

*Q.*—A. takes a cheque of B. on his bankers, and cannot, without some inconvenience, present it for payment until some days after ; and when he does so, finds that the bankers have stopped payment in the meantime. Can he recover the amount afterwards against B. ?

*A.*—If a cheque be payable at a banker's in the place where the party receives it, it should be presented for payment during banking hours on the day after it is received. If it be payable elsewhere, it suffices to forward it by the regular post on the day after it is received ; and the party receiving it by post, has till the next day to present it ; if this be not done, and the banker fails, the party guilty of the negligence will have to bear the loss : (Smith's Merc. Law, 248, 5th edit. ; Byles on Bills, 12, 13, 4th edit.)

*Q.*—A promissory note is made payable to a woman before her marriage. She afterwards marries, and the husband dies, leaving her surviving. Can she bring an action upon the note ?

*A.*—If the note is not recovered upon in their joint lives it reverts to the woman, and she may bring an action upon it. The note is a *chosc in action*, and as such, if not reduced into possession in their joint lives, goes to the woman if she survive her husband, or to the husband as her administrator, if he survive : (see Byles on Bills ; Smith's Merc. Law, 222, 5th edit. ; Matthews' Guide to Exors. 44, 2nd edit.)

*Q.*—A promissory note is made payable to a husband and wife, and the husband dies before it is paid, his wife surviving him. Can she maintain an action upon it ?

*A.*—It seems the widow may sue for the amount of the note : (see

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(a) The following question may be easily answered from this and the next preceding answer :—Which of the parties to a bill of exchange is primarily liable to pay it, and how is this liability affected by the bill being accepted for accommodation ?

Byles on Bills ; Smith's Merc. Law, *supra*, and the authorities therein cited.)

**Q.**—A client brings an over-due bill of exchange to his attorney: give a detailed account of the steps that must be taken to enforce payment, and suggest any difficulties occurring to you that may arise as to its recovery; also some of the different ways in which the client might be holder.

**A.**—The attorney should first inquire whether proper notice of dishonour has been given ; if such notice has not been given and one is requisite, and the time for giving it has not elapsed, the attorney should give the notice. To enforce payment an action must be brought, which is done by the attorney suing out a writ (as to which see stat. 18 & 19 Vict. c. 67), and proceeding thereon to judgment and execution. As the bill is over-due, the attorney should inquire of his client whether he took it previously or subsequently to its becoming due ; for if the client took it subsequently to its becoming due, he will hold it subject to all the equities attaching to the bill : (see Smith's Merc. Law, 251 to 255, 270, 5th edit.) The client may be holder of the bill as drawer (being also payee), or as payee (not being the drawer), or as indorsee.

**Q.**—In an action brought under the 18 & 19 Vict. c. 67 (the Act to facilitate the Remedies on Bills of Exchange and Promissory Notes by the prevention of frivolous or fictitious defences to actions thereon), against the acceptor of a bill of exchange, who has not paid the bill when due, can the defendant appear and plead as in other actions; and if not, what steps must be taken to enable him to do so ?

**A.**—In an action on a bill of exchange commenced under this act within six months of its becoming due, the defendant cannot appear and plead as in other actions, but he must, within twelve days after being served with the writ, either pay the debt into court, or apply to a judge for leave to appear and plead, showing by affidavit a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or other facts satisfactory to the judge, who may then make an order on terms as to security or otherwise: (18 & 19 Vict. c. 67.)

**Q.**—What is the proper mode of suing on a bill of exchange or promissory note with respect to indorsing the writ of summons, the time for signing judgment for want of appearance, and obtaining leave to appear and defend ?

**A.**—The proper mode of suing on a bill of exchange or promissory note is under the 18 & 19 Vict. c. 67. But actions under this act must be commenced within six months after such bill of exchange or promissory note becomes due and payable. The writ is indorsed with the name and address of the attorney suing out the same, or with that of the plaintiff if he acts in person. The amount claimed by the plaintiff must also be indorsed on the writ, and a copy of the bill or note set forth; the amount claimed for costs, as also a notice stating that if the amount be paid to the plaintiff or his attorney within four days from the service, further proceedings will be stayed, must also be indorsed thereon. Also a notice stating, that if the defendant do not obtain leave from one of the judges of the superior courts within twelve days after having been served with the writ, inclusive of the day of service, to appear thereto, and do not within such time cause an appearance to be entered for him in the court out of which the writ issues, the plaintiff will be at liberty

at any time after the expiration of such twelve days, to sign final judgment for any sum not exceeding the sum above claimed, and the sum of £ for costs, and issue execution for the same. Leave to appear is obtained from a judge at chambers; the application being supported by affidavit showing that there is a defence to the action on the merits, or that it is reasonable that the defendant should be allowed to appear in the action: (see Paterson and Macnamara's Com. Law Pract. 997, 998, where a form of writ is given.)

**Q.**—In an action on a bill of exchange, how can the plaintiff prevent the defendant from setting up the loss of the instrument?

**A.**—By the Common Law Procedure Act, 1854, it is now provided that in actions founded on a bill of exchange or other negotiable instrument, it shall be lawful for the court or a judge to order that the loss of such instrument shall not be set up, provided that an indemnity is given to the satisfaction of the court or judge, or a master, against the claim of any other person upon such negotiable instrument: (17 & 18 Vict. c. 125, s. 87.) If the bill or note was not originally negotiable, the loss of it is no defence to an action upon it, for no one could have a good title to it except the payee.

**Q.**—The owner of a bill of exchange has a right to sue the drawer, acceptor and indorser of it. Can he do so by means of one writ, or is he bound to issue three separate writs?

**A.**—The holder of a bill of exchange cannot sue the drawer, acceptor and indorser in one action, except under the Bills of Exchange Act; for the contract is several and not joint. By the 18 & 19 Vict. c. 57, s. 6, however, a writ issued under this act may include all the parties to the bill or note sued upon. But the subsequent proceedings are as if separate actions had been commenced. This act, it will be remembered, only applies to bills and notes not more than six months over-due.

**Q.**—Can a person lawfully receive more than five per cent. interest; and if so, on what security?

**A.**—A person may lawfully receive more than five per cent. interest on any security, as the laws against usury are now repealed by stat. 17 & 18 Vict. c. 90. And even before this act more than five per cent. interest might have been taken, as on bills of exchange and promissory notes not having more than twelve months to run, by stat. 2 & 3 Vict. c. 37. This act was to remain in force till 1842, but its operation was from time to time extended: (see Smith's Merc. Law, 519, 5th edit.) Also, any amount of interest might have been received on *bottomry* or *respondentia* contracts, before the 17 & 18 Vict. c. 90: (Id. 402.)

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## LANDLORD AND TENANT.

**Question.**—Is it necessary that a notice to quit should in all cases be in writing?

**Answer.**—The notice need not be in writing unless it be so agreed between the parties: (*Macartney v. Crick*, 5 Esp. 196; *Legg v. Benison*, Willes, 43.) It is desirable, however, that the notice should be in writing in all cases, to prevent any dispute as to its sufficiency, and also to facilitate proof.

**Q.**—What notice to quit should be given to a tenant who holds under a yearly tenancy?

*A.*—Six months' notice must be given to a tenant who holds under a yearly tenancy, before the same can be determined : (see Will. Real Pro. 325, 4th edit. ; 1 Steph. Com. 279, 3rd edit.)

*Q.*—Does the half-year's notice refer to any particular period of the tenancy ?

*A.*—Yes ; the notice must be given half a year previous to the expiration of the *current year of the tenancy*, so that if the tenant enter on any quarter-day, he can quit only on the same quarter-day : (see Will. Real Pro. *sup.* ; Steph. Com. *sup.*)

*Q.*—A notice to quit being given to a tenant by his landlord, what liability does the tenant incur by holding over ?

*A.*—By 4 Geo. 2, c. 28, it is enacted, that when a tenant holds over, after demand made and notice in writing to quit has been given to him by his landlord, the tenant is liable to pay the landlord *double the yearly value* of the premises, for so long a time as the same are detained, to be recovered by action of debt ; the defendant being obliged to give special bail ; and against the recovery of this penalty, there is no relief in equity. If the *tenant* should give the notice, which need not be in writing, and does not deliver up possession of the premises holden by him at the time mentioned in the notice, then such tenant, his executors or administrators, shall thenceforward pay to the landlord *double the rent* which he should otherwise have paid, which is to be levied, sued for, and recovered by action or distress : (see 11 Geo. 2, c. 19, s. 18 ; Arch. L. & T. 211, 216, 2nd edit.)

*Q.*—At what time of the day, on which it is due, must rent be paid, in order to prevent proceedings ?

*A.*—Rent is not actually due until midnight of the day upon which it is reserved : (see Matthews' Guide to Executors, 7, 2nd edit.) The payment should, properly speaking, be made such time before sunset as to allow sufficient light to count the money.

*Q.*—Receipt for half a year's rent to Christmas last ; does it prove payment of the rent to the previous Midsummer ?

*A.*—Such a receipt is *primâ facie* proof of the payment of the rent to the previous Midsummer ; but this presumption may be rebutted by the landlord : (Co. Lit. 373 a ; Arch. L. & T. 151, 2nd edit. ; Taylor on Evidence, 746.)

*Q.*—An occupier of two houses under two different landlords, one at a rent certain, the other without any agreement for any specific sum ; have the two landlords the like remedy for rent, or how does it differ ?

*A.*—Yes ; there is this difference,—the landlord to whom the tenant pays a certain rent may distrain for such rent, but the landlord who has let the house without any agreement for a specific sum cannot distrain : his only remedy will be an action for use and occupation ; for, in order to support a distress, the rent must be certain : (3 Steph. Com. 342, 3rd edit. ; Arch. L. & T. 113, 2nd edit.)

*Q.*—What are the quarter days of the year ? How is a tenancy from year to year determined on either side ? If a tenancy from year to year commence at Lady-day, 1857, when would it be determinable ?

*A.*—The quarter days are the 25th March (Lady-day), the 24th June (Midsummer-day), the 29th September (Michaelmas-day) and the 25th December (Christmas-day). A tenancy from year to year can only be determined by six calendar months' notice being given, to expire at the

end of the current year's tenancy : (Arch. L. & T. 2nd edit.) Therefore, if a tenancy from year to year commenced on Lady-day, it must end on a subsequent Lady-day.

Q.—Must a lease for seven years be in writing? and what is the limit of time for which a parol lease may be legally made?

A.—The Statute of Frauds enacts that all leases whatever, with the exception of those not exceeding three years, with a rent of not less than two-thirds of the improved value, must now be in writing and signed by the lessor or his agent lawfully authorised: (29 Car. 2, c. 3.) And the 8 & 9 Vict. c. 106, enacts that a lease required by law to be in writing of any tenements or hereditaments shall be void at law unless made by deed: (s. 3.)

Q.—A. grants a lease to B. for twenty-one years, at the rent of 100*l.* per annum; at the end of three years B. assigns the remainder of the term to C., subject to the rent: after this assignment, rent becomes due to A., who, not being able to obtain payment from C., calls upon B. to pay; B. objects that he has assigned to C. Is B. liable to pay the rent?

A.—B. is liable to pay the rent, notwithstanding the assignment to C.; for immediately on the execution of the lease to B. a *privity of contract* arises between him and the lessor, and this privity of contract continues during the whole of the term, and B. or his personal representative is liable on the covenant, notwithstanding any assignment he may make. In assigning leaseholds, however, the assignee is required to enter into a covenant to indemnify the assignor from payment of the rent: (see Will. Real Pro. 330, 4th edit.; Sug. Vend. & Pur. Con. View. 25, 137.)

Q.—Is a tenant liable to pay the rent of premises accidentally destroyed by fire, under any and what circumstances? (a)

A.—Yes; for if a tenant covenants generally, that is, without any exceptions, to pay rent during the term, it must be paid notwithstanding the premises are accidentally burnt down during the term: (*Monk v. Cooper*, 2 Str. 763; S. C., 2 Lord Raymond; *Balfour v. Weston*, 1 Term Rep. 310; Arch. L. & T. 153, 2nd edit.)

Q.—What fixtures may a tenant remove, and when must such removal be made?

A.—As between landlord and tenant the latter may take away such fixtures as he has himself put upon the demised premises, either for the purposes of trade, or for ornament, or furniture of his house, if thereby the freehold be not materially damaged; but such fixtures must be removed either during the continuance of his term, or at the end of it; for he *cannot remove them after he has quitted the premises*: (see Broom's Maxims, 317, 2nd edit.; Arch. L. & T. 352, 2nd edit.) By the 14 & 15 Vict. c. 25, s. 3, it is enacted, that if any tenant of a farm, or lands, shall, with the consent in writing of the landlord, at his own cost and expense, erect any farm building, either detached or otherwise, or put up any other building, engine, or machinery, either for agricultural purposes or for the purposes of trade and agriculture (not being put up in pursuance of some obligation in that behalf), then the same may be removed by the tenant, he making good any injury to the premises, if on a month's previous notice in writing being given to the landlord by the

(a) This question will also appear in the Equity division.

tenant he does not elect to purchase the erections ; and if the landlord elects to purchase them, the tenant's right of removal ceases.

*Q.*—If a landlord let a house on an agreement, and the tenant run away, leaving no sufficient property on the premises to pay the rent, how is the landlord to obtain possession so as to put an end to the agreement ?

*A.*—By the 11 Geo. 2, c. 19, s. 16, if any tenant at rack rent, or where the rent reserved shall be three-fourths of the yearly value of the demised premises, who shall be in arrear one year's rent, shall desert the demised premises and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, two justices of the peace of the county or riding, &c., having no interest in the demised premises, may, at the request of the lessor or landlord, &c., go upon and view the same, and affix upon the most notorious part of the premises notice in writing on what day (at the distance of fourteen days at the least) they will return to take a second view thereof ; and if on such second view the tenant or some person on his behalf shall not appear and pay the rent, or there shall not be sufficient distress on the premises, then the said justices may put the landlord into possession, and the lease to such tenant, as to such demise, shall from thence be void. The provisions of the above act are now extended by the 57 Geo. 2, c. 52, to cases where only half a year's rent is in arrear, and also to cases where there is no power of re-entry, and whether the lease be by writing or parol, which was required by the former statute : (see Arch. L. & T. 171, 2nd edit.)

*Q.*—If a landlord lets a house by parol for three years, and nothing is mentioned as to repairs, state what repairs each party would be liable to, and what would be dilapidations on the part of the tenant.

*A.*—If a landlord lets a house by parol for three years, and nothing is said about repairs, the lessor is not bound to repair it ; but the lessee, who has the use of it, ought to do so ; and from his duty to repair it, the law implies a promise by him to that effect. If the tenant suffer the house to be out of repair, the lessor might, formerly by Statute of Gloucester, have had an action of waste, or on the case in the nature of waste, against the tenant, unless the house were ruinous at the time of the lease : (see Arch. L. & T. 198, 2nd edit.) But, it now seems doubtful whether a tenant for years is liable for mere *permissive* waste : (1 Steph. Com. 276, note, 3rd edit.) But the tenant is clearly liable for commisive waste, as if he remove doors, windows, or wainscot, &c. : (Arch. L. & T. 200, 2nd edit.)

*Q.*—What repairs or dilapidations is a tenant from year to year liable to make good in respect of a messuage or land so let to him ?

*A.*—It seems that a tenant from year to year is only bound to make fair and tenantable repairs, to keep the house wind and watertight, so far as to prevent waste or decay of the premises, and not to substantial or lasting repairs, such as new roofing, or the like ; and he is not liable for mere wear and tear of the premises : (see Woodfall's L. & T. 435, 6th edit. ; Arch. L. & T. 198, 200, 2nd edit. ; Chitty on Cont. 297, 4th edit.)

*Q.*—Is a landlord or incoming tenant, and which, liable at the expiration of a lease, to pay the outgoing tenant in respect of manure, crops, &c., who holds under a lease ; and what will be the difference if he be only tenant at will ?

A.—As regards the tenants holding under a lease, if there are any covenants in it relating to the manure, &c., then, of course, both landlord and tenant will be bound by them; but if there be no agreement or lease, nor any stipulations in them, then it will depend on, and the parties be bound by, the custom of the country. The outgoing tenant, whether for years or at will, may remove manure, crops, &c., unless either the landlord or incoming tenant elect to take them, and unless there is a custom to the contrary, in which case the landlord is entitled: (see Arch. L. & T. 39, 345, 2nd edit.; Broom's Max. 306 to 310, 2nd edit.)

## THE LAW OF TORTS OR PRIVATE WRONGS.

*Question.*—Is an infant liable for torts committed by him?

*Answer.*—An infant is liable for torts committed by him, but not for such as arise out of contract. Thus, he is liable for a personal trespass, but he is not liable in trover for goods delivered under a contract. So, if an infant, affirming himself to be of full age, borrows one hundred pounds, and gives his bond for it, and being sued upon the bond, avoids it by reason of his non-age, yet no action lies against him for the deceit: (see 4 Bacon's Abr. tit. "Infancy," H. I. 351 to 354, 7th edit.; Broom's Max. 232, 2nd edit.; Chitty on Cont. 144, 4th edit.)

Q.—An orphan of tender years has had his leg broken by wilful negligence. Can he bring an action for the injury, and if so, how, and what action?

A.—An orphan having had his leg broken by wilful negligence, may maintain an action to recover damages for the injury sustained. The infant must sue by guardian or *prochein amy*, to be admitted by order of a judge, obtained upon petition: (Arch. New Com. Law Pract. 341, 2nd edit.) As to the form of action, this will be either trespass or case, according to the circumstances under which the act occasioning the injury was committed: if the act occasioning the injury was direct and immediate, the form of action will be trespass, but if the act is not *immediately* injurious, but only by *consequence* or collaterally, then an action on the case should be brought: (see 3 Steph. Com. 453, 3rd edit.; 1 Arch. N. P. 405, 538.)

Q.—A father and his child under ten years of age receive injuries by a collision on a railway: in seeking compensation at law for such injuries, must there be more actions than one, and in whose name or names is or are such action or actions to be brought?

A.—There should be two actions. The father must bring his action to recover damages for the injuries done to him; and an action must be brought for the child by his guardian or *prochein amy* for compensation for the injuries he has sustained. The father may bring this latter action in the character of *prochein amy*. The reason for requiring separate actions being, that they are instituted in different rights and capacities.

Q.—What is the difference between slander and libel?

A.—Slander is the malicious defamation of a man, either with respect to his character, trade, profession, or occupation, by word of mouth; the



same as a libel is by *writing*, or other significant characters : (Holth. Law. Dic. 2nd edit.) A libel may be defined to be a malicious defamation, expressed in printing or writing, or by signs, pictures, &c., tending to injure the reputation of another, and thereby expose him to public hatred, contempt, or ridicule : (3 Steph. Com. 469, 3rd edit. ; Broom's Max. 233, 2nd edit.) There is also a great difference in degree as to what constitutes libel and what slander; many words which, if spoken would not be actionable, are actionable if published in the way of libel : (see 3 Steph. Com. 464, *et seq.* 3rd edit.) Again, libels may be punished criminally as well as civilly ; but mere verbal slander is not generally punishable criminally, but only in certain cases : (*Ib.*)

Q.—For what damages are hundredors liable, and what are the necessary steps to be taken before a writ is issued, and against whom should it issue ?

A.—Hundredors are now only liable for damages done by rioters *feloniously*. If the damage exceed 30*l.*, an action may be brought within three calendar months. Prior to bringing the action the plaintiff, or his servant having the care of the property injured, shall, within seven days after the commission of the offence, go before some near resident justice, and state on oath the names of the offenders, and submit to an examination, and enter into a recognizance to prosecute. The process is the same as in ordinary cases ; it is directed to “the men inhabiting within the hundred of \_\_\_\_\_, in the county of \_\_\_\_\_,” or other like district generally, and not against any individuals by name. The writ is served on the high constable, or on any one of the high constables of the hundred : (15 & 16 Vict. c. 76, s. 16.) If the damage done does not exceed 30*l.*, no action can be brought, but the proceeding is summary before justices at a special petty session : (see 7 & 8 Geo. 4, c. 31, by which the proceedings are regulated.)

Q.—A man commits an assault in the street, and in so doing breaks unintentionally a square of valuable plate-glass in a shop window ; another slips down accidentally and does the like. Has the owner of the glass a remedy at law against both or either of the persons ?

A.—In the first case, the person being in the act of committing an unlawful act, the owner of the glass has a remedy against him ; but where the window was broken by accident, he has no remedy, as it was unavoidable : (Broom's Max. 282, 288, 2nd edit. ; and see Arch. N. P. 378, 402.)

Q.—A. commits an assault upon B., and before action brought B. dies. Can B.'s executors or administrators sue A. for the recovery of damages for the assault ?

A.—In such a case the executors or administrators cannot sue A. for the assault, unless B. dies from the effects of the assault. For by the common law an executor could not maintain an action for a tort done to his testator or his property, the maxim *actio personalis moritur cum personâ* applying : (Broom's Max. 706, 2nd edit.) But by 4 Edw. 3, c. 7, executors (which is extended to executors of executors by 25 Edw. 3, c. 5, and to administrators by 43 Edw. 3, c. 11) may bring an action for a trespass to the *goods and chattels* of their testator. And by 3 & 4 Will. 4, c. 42, s. 2, this remedy is extended to injuries to the *real estate* of any person deceased, if committed within six months before his death, and provided such action be brought within one year after his

death: (see Broom's Max. 702 to 707, 2nd edit.; 3 Steph. Com. 458, 3rd edit.)

**Q.**—When is a master answerable for damages done by his servant, and when not?

**A.**—Where a servant commits a tortious act under the direction or with the assent of his master, each is liable, at the suit of the party injured, because the authority of the master cannot justify the wrongful act, and the maxim *respondeat superior* (a) applies. This principle is also very often applicable where the injury is sustained in consequence of the servant's negligent performance of his master's orders. A master is not, however, liable for injury committed by the servant *wilfully*, while neither employed in the master's service, nor acting within the scope of his authority: as, if a servant authorized merely to distrain cattle damage feasant, drives cattle from the highway into his master's close, and there distrains them; the principle of *respondeat superior* not applying in such a case: (see Broom's Max. 668, 672, 2nd edit.; Smith's Merc. Law, 155, *et seq.* 5th edit.)

**Q.**—Will the liability of the master, as stated in the preceding question, be altered by the injured party being also his servant?

**A.**—As a general rule it will make no difference in the master's liability, because the injured party is also the master's servant: (see references, *sup.*) But a master is not responsible in the case of one servant sustaining an injury from the negligence of a fellow-servant of competent skill in the course of their common employment: (see Smith's Merc. Law, 157 n. 5th edit.; *Degg v. The Midland Railway Company*, 28 L. T. Rep. 357; *Griffiths v. Gidlow*, 31 L. T. Rep. 300.)

**Q.**—If I start game in my own land, have I a right to follow it into the land of my neighbour?

**A.**—In general, no person, though he find game upon his own land, has a right to pursue it upon the land of another, either to kill or take it when killed, or for any other purpose. But a person may by the common law enter the lands of another to follow beasts of prey, as a fox or a badger, for the purpose of destroying them as such; and in this case no trespass will lie, though it will in the former. But the digging and breaking the ground of another to unearth even beasts of prey is unlawful. So, the pursuit of a fox for mere purposes of pleasure will not justify entering another's land: (see Arch. N. P. 297, 320; 2 Bla. Com. 417, *et seq.*; 2 Steph. Com. 19, 2nd edit.)

**Q.**—Explain the meaning of the maxim *actio personalis moritur cum personâ*; and give an instance of its application.

**A.**—The meaning of the above maxim is, that a *personal right of action dies with the person*; for example, if A. commits an assault upon B. and B. dies before an action is brought, his personal representatives cannot sue A. for damages for the assault; (and formerly) though B. had died by the wrongful act of A.: (see Broom's Max. 702, *et seq.* 2nd edit.)

**Q.**—Has any and what alteration been made in the above maxim by the 9 & 10 Vict. c. 93?

**A.**—Yes; by that act it is enacted, that "whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect

(a) *Respondeat superior*, i. e., Let the principal answer.

thereof, then and in every such case the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony :” (9 & 10 Vict. c. 93, s. 1.)

**Q.**—In case of injury to a person from which death ensues, is there any mode by which compensation can be sought, and by what means, and by whom and against whom must it be brought, and what species of loss is recoverable in such an action ?

**A.**—As above seen, in such a case, an action may be brought. No form is given by the act, but the words of the act are, that the person “shall be liable to an *action for damages*.” The 2nd section provides that every such action shall be for the benefit of the wife, husband, parent, and child, of the person whose death shall have been so caused, and to be brought by and in the name of the executor or administrator of the deceased person. The action is brought against the person who would have been liable if death had not ensued. It must be brought within twelve calendar months after the death: (sect. 3.) The word “parent” is to include “father and mother, and grandfather and grandmother, and stepfather and stepmother,” and the word “child” is to include “son and daughter, and grandson and grand-daughter, and stepson and step-daughter:” (sect. 5.) The rule respecting actions for negligence, namely, that no action lies if the person injured might by reasonable care have avoided the injury, or at all events if he did by his own negligence contribute to the injury, applies to actions under this statute. It will also be observed that this act only applies where death ensues from the particular wrongful act, and does not apply where a tort is committed to the person, which does not occasion death: (see Broom’s Max. 708, 2nd edit.) As regards the species of loss recoverable under this statute, to entitle the representatives to recover, they must be in the loss of some pecuniary advantage, either presently or in expectation. Damages are not to be given as a *solatium* to the feelings of the deceased’s representatives, or in reference to the loss of a legal right: (*Franklin v. The South-Eastern Railway Company*, 31 L. T. Rep. 154.)

**Q.**—Whilst A. is riding in his carriage, his coachman, in driving, knocks a man down, and injures him. Upon another occasion, when A. is not riding in his carriage, his coachman does a similar thing. Can the party injured bring an action of trespass against A. in both or either and which of these cases ?

**A.**—In the first instance, that is, when the master was present, an action of trespass may be maintained against him for the injury sustained; but, in the latter instance, an action on the case can only be brought: (Arch. N. P. 299, 436.) But it must be remembered that no objection to the form of an action can now be taken: (15 & 16 Vict. c. 76.)

**Q.**—In case of an injury to a person on the Queen’s highway by job horses on a yearly hiring, not driven by the job-master’s servant, who is liable for it ?

**A.**—The person hiring the job horses will be liable, as they are not driven by the job-master’s servant, otherwise the job-master would be liable: (see Arch. N. P. 436, 437; Smith’s Merc. Law, 156 n., 5th edit.) In answering this question it is presumed that either the person hiring the job horses, or *his* servant, was driving at the time of the injury.

**Q.**—In what way is a stage-coach proprietor liable to a passenger travelling by his coach, for hurt or injury?

**A.**—A stage-coach proprietor is liable to a passenger travelling by his coach for any hurt or injury arising from want of skill in the coachman, for any defect in the construction of the coach, or the viciousness of the horses, or for negligence. But if the hurt or injury sustained be the result of mere accident no action lies: (*Aston v. Heaven*, 2 Esp. N.P. C. 533; *Broom's Max.* 177, 2nd edit.)

**Q.**—If a traveller by a railway sustain an injury on the journey, will he be entitled to compensation, and against whom should he proceed?

**A.**—If the injury was occasioned through the negligence of the company's servants, an action may be brought against the company: (see *Palmer v. Grand Junction Railway Company*, 3 Jur. 559; 4 M. & W. 749.) It should be observed that in cases of this nature, if the plaintiff has by negligence contributed to the injury, he cannot recover.

**Q.**—If A. sues for damage arising from the negligent conduct of B., how far may his right to recover be affected by his own want of care?

**A.**—Where one person sues another for damages for some injury in consequence of the negligence of that other, or his servants or workmen, it is a bar to his right to recover if he could, by exercising ordinary care, have avoided the injury, or at least if it can be shown that he, by negligence or want of proper care, contributed to the accident: (see *L. J. (Ex.)* 291, 293.)

**Q.**—State some of the nuisances affecting dwelling-houses and lands, for which an action will lie.

**A.**—If a man do or permit or suffer to be done upon his own land, anything which has the effect of injuring his neighbour, the latter may, in general, have his remedy against him by an action on the case. The following instances may be mentioned:—If a man build a house upon his own land, but so near to another's that his roof overhangs the other's roof, and throws the water off his roof upon the others; if a man set up an offensive trade, such as a tanner's, or a tallow-chandler's, or the like, or erect or maintain an offensive thing upon the premises, as a hogstye, a limekiln, or a dungheap, the stench from which renders the air unwholesome, and the enjoyment of property uncomfortable. Various other instances may be mentioned, as obstructing lights, or diverting watercourses: (*Arch. N. P.* 420, *et seq.*; 3 *Steph. Com.* 493, 3rd edit.)

**Q.**—How should a person proceed for damages against a wilful trespasser, when they would not amount to 5*l.*?

**A.**—By the 7 & 8 Geo. 4, c. 30, s. 24, it is enacted, that if any person shall wilfully or maliciously commit any damage, injury, or spoil, to or upon any real or personal property whatsoever, either of a public or private nature, for which no remedy or punishment is by the act provided, every such person, on being convicted thereof before a justice of the peace, is to forfeit and pay such a sum of money as shall appear to such justice to be a reasonable compensation for the damage, injury, or spoil committed, *not exceeding* the sum of five pounds; which sum, in the case of private property, is to be paid to the party aggrieved, except where such party has been examined in proof of the offence. It is, however, provided that nothing in the act shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a

right to do the act complained of, or to any trespass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game.

*Q.*—May the owner of a horse which has been stolen from him retake it in any and in what place?

*A.*—If the owner of a horse be deprived of it by another person, he may retake it wherever he happens to find it, so that it be not done in a riotous manner, or attended with a breach of the peace, which retaking is termed *recaption*. So that the owner will not be justified in breaking open a private stable, or the like, to retake the horse. The same rule applies to other personal property; also to the wife, child, or servant of the party: (see 3 Bla. Com. 4; 3 Steph. Com. 338, 3rd edit.) If a horse is feloniously stolen, it seems the owner may break open a private stable, or enter the grounds of another to retake it, if he has reason to suspect that it is there, but not otherwise: (3 Bla. Com. *ut sup.*; 3 Steph. *sup.*; Broom's Max. 225 n., 2nd edit.)

## LIMITATIONS OF ACTIONS.

*Question.*—Within what time must an action of debt on simple contract, or on a specialty be brought, except in cases of disability?

*Answer.*—An action to recover a simple contract debt must be brought within six years from the time the cause of action accrued, and to recover a debt on specialty within twenty years from the accruing of the cause of action: saving in all cases the right of persons under disability, as infants, feme coverts, persons non compos mentis, and as to the debtor being beyond the seas, and as to simple contract debts, and the debtor being imprisoned: (see 21 Jac. 1, c. 16; 3 & 4 Will. 4, c. 42; 3 Steph. Com. 551, *et seq.* 3rd edit.; 19 & 20 Vict. c. 97.)

*Q.*—In what cases of disability may actions be brought after the disability ceases?

*A.*—The cases of disability have been already mentioned: a party under any of those disabilities is at liberty to bring his action within the same period after the removal of the disability as is allowed to persons having no such impediment. The 4 Anne, c. 16, s. 19, enables a creditor to sue his debtor, who was beyond the seas when the cause of action accrued, within six years after his return. And the 3 & 4 Will. 4, c. 42, s. 2, gives the same time to a party after his debtor's return from abroad to sue him, as such party would have had to proceed against the debtor if he had not been abroad at the time the cause of action accrued. But when the Statute of Limitations has once commenced running nothing can stop it: (see generally 3 Steph. Com. *ubi sup.* and *post*, p. 31.) It may be here stated that the statute does not destroy a debt, but only bars the remedy: (see *post*, p. 32.)

*Q.*—Does the Statute of Limitations apply where a debtor was abroad when the cause of action accrued, and who has returned to this country, and if not, within what time may the action be commenced?

A.—Where a debtor is abroad at the time the cause of action accrues, the creditor has six years after the debtor's return to bring his action, by virtue of the stat. 4 Anne, c. 16, s. 19. This section is not affected by sect. 10 of the 19 & 20 Vict. c. 97. As to *where* is deemed beyond seas, see sect. 12 of the last-mentioned act.

Q.—When a party is beyond seas at the time when a cause of action accrues to him, is he entitled to any and what further time for commencing his action beyond the period prescribed by the Statute of Limitations?

A.—Where a party having a right to sue is abroad when that right accrues, this fact is no longer a disability as formerly; the stat. 19 & 20 Vict. c. 97, enacting that no person or persons who shall be entitled to any action or suit, with respect to which the period of limitation within which the same shall be brought is fixed by the several Statutes of Limitation, shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the several Statutes of Limitation, by reason only of such person, or some one or more of such persons, being at the time such cause of action or suit accrued beyond the seas: (sect. 10.) It will be seen that this section only relates to a creditor being abroad when the cause of action accrued, and not to a debtor.

Q.—In respect of a lease under seal, how long does the liability of the lessee last, and within what time may an action of covenant be brought?

A.—The liability of a lessee under a lease by deed lasts as long as the lease itself: (see *ante*, p. 29.) An action of covenant may be brought within twenty years after the accruing of the cause of action: (3 & 4 Will. 4, c. 42, s. 3; 3 Steph. Com. 554, 3rd edit.)

Q.—Where there are several parties who are entitled jointly to sue in an action of contract, and one of them is abroad, does the statute run against the others?

A.—The absence of one of several joint contractees does not prevent the statute running against the others, as an action might be brought, in their joint names, by the parties who are residing here. But it was otherwise if one of several joint contractors was abroad: (*Perry v. Jackson*, 4 T. R. 516.) Now, however, the 19 & 20 Vict. c. 97, enacts that when there is a cause of action against two or more joint debtors, the creditor shall not be entitled to any time to commence and sue any action or suit against any one or more of such joint debtors who shall *not* be beyond seas at the time such cause of action or suit accrued by reason only that one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas; and the creditor is not to be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond the seas at the time the cause of action or suit accrued after his or their return from beyond the seas, merely because judgment has been recovered against any one or more of such joint debtors who was not or were not beyond seas at the time the cause of action accrued: (see sect. 11.)

Q.—Suppose a debt to be incurred by a party resident in this country, and some months after the debtor leave the country and reside abroad, when would the Statute of Limitations begin to run?

A.—The statute would begin to run at the time of contracting the debt (Arch. N. P. 130); and, as it is a rule that when it has once

begun to run nothing (except as stated below) can stop its operation, the subsequent departure of the debtor from this country will not prevent the statute running against the debt: (*Smith v. Hill*, 1 Wils. 134; Arch. N. P. 131.)

Q.—Is the Statute of Limitations a good answer to an action of *assumpsit* on a bill of exchange more than six years old, on which bill the interest has been paid within six years?

A.—The Statute of Limitations is not a good answer to an action of *assumpsit* on a bill of exchange more than six years old, where it is proved that interest has been paid within six years before the commencement of the action: (Arch. N. P. 137.)

Q.—Should the period within which an action on a simple contract debt can be brought have expired, and the defendant should plead the Statute of Limitations, will a verbal promise given within the limited time be sufficient to enable the plaintiff to recover, or must he be prepared with any and what further evidence?

A.—In such a case a verbal promise will not entitle the plaintiff to recover; for the 9 Geo. 4, c. 14, enacts that no acknowledgment or promise, by *words only*, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the Statute of Limitations, or deprive any party of the benefit of it, unless the promise or acknowledgment is in *writing* and signed by the party to be charged therewith (sect. 1), or his duly authorized agent: (19 & 20 Vict. c. 97, s. 13.)

Q.—In an action against two or more joint contractors to recover a debt which is statute barred, evidence can be given of an acknowledgment by one of them; will this revive the debt against the other joint contractor or contractors?

A.—No; the 9 Geo. 4, c. 14, enacting that where there are two or more joint contractors, or joint executors or administrators of any contractor, no joint contractor, or joint executor, or administrator shall lose the benefit of the enactments of the Statute of Limitations, by reason only of the written acknowledgment of the other. But a payment of either principal or interest by one contractor, &c., would formerly have revived a debt which was statute barred, against the others: (sect. 1.) But now the 19 & 20 Vict. c. 97, enacts that no co-contractor, co-debtor, executor or administrator shall lose the benefit of the enactments of the Statute of Limitations by reason of the payment of any principal, interest, or other money made by any other or others of such co-contractor, co-debtor, executor or administrator: (sect. 14.)

Q.—What is necessary to prevent the Statute of Limitations running against a debt?

A.—A written acknowledgment signed by the party liable, or a payment either of principal or interest, will prevent the statute running: (9 Geo. 4, c. 14.) The acknowledgment must be such that a promise to pay may be implied from it: (Arch. N. P. 135 to 137.)

If the defendant cannot be found, the effect of the statute may be barred by suing out a writ of summons, and getting it renewed within successive periods of six months, as directed by sect. 11 of 15 & 16 Vict. c. 76.

Q.—When a writ is issued against a party who cannot be served, what steps should be taken to prevent the Statute of Limitations barring the right of action?

*A.*—When a defendant cannot be served, and it is wished to prevent the Statute of Limitations barring the right of action, the writ may be renewed at any time before its expiration for six months from the date of such renewal, and so from time to time from the date of such renewed writ, by being impressed with a seal provided for that purpose and kept at the Master's office. At the time of renewal a *præcipe* must be left : (see 15 & 16 Vict. c. 76 ; Pat. & Mac. Com. L. Pr. 59.)

*Q.*—When a person has a lien on goods as a security for a debt, and such debt becomes barred by the Statute of Limitations, does the lien continue or is it determined ?

*A.*—The lien will continue, for the Statutes of Limitations governing *personal* actions merely bars the remedy of action, and does not extinguish the *right* to the debt ; as do those governing *real* actions : (see 3 Steph. Com. 556, 3rd edit.)

## PARTIES TO ACTIONS.

*Question.*—Are there any persons who cannot bring actions in their own names, and how can they proceed to recover damages for an injury ?

*Answer.*—In general a married woman cannot bring an action in her own name, but her husband must join with her : (Arch. New C. L. Pract. 24, 2nd edit.) So an infant cannot sue in his own right by attorney, or in person, but must do so by *prochein amy* or guardian : (*Id.* 341.) The proceedings in actions by idiots or lunatics are the same as in ordinary cases, except that an idiot must appear in person, and then any person who may pray to be admitted to sue for him shall be allowed to do so : but a lunatic must appear by guardian, if within age, or by attorney if of full age : (*Id.* 340.) An outlaw cannot sue during the continuance of the outlawry : (Smith's Action at Law, 65, 5th edit.)

*Q.*—How can an infant maintain an action ?

*A.*—An infant must sue by *prochein amy* (usually the father), to be admitted by order of a judge, upon a petition presented to the chief justice or chief baron for that purpose, signed by the infant, with a consent of the person who is to be the *prochein amy* subscribed to it, and an affidavit verifying the signatures of the infant and *prochein amy*, the judge will grant his fiat for a rule accordingly, and the rule will then be drawn up as in ordinary cases on production of the fiat. An infant may also sue by guardian, but this is not very usual in practice : (Arch. New C. L. Pract. 341, 2nd edit.)

*Q.*—Can a married woman maintain an action alone under any and what circumstances ?

*A.*—Yes ; if the husband be civilly dead, by reason of his attainder, or being banished, or transported ; or where husband and wife are judicially separated, or the wife has obtained an order protecting her earnings and property under the Divorce Act : (20 & 21 Vict. c. 85.) So, where the husband is dead by legal presumption ; as, if he has not been heard of for seven years, the wife may sue alone. So, if the husband be an alien enemy : (see Co. Lit. 132 b. ; Arch. New C. L. Pract. 25, 2nd edit.)



Q.—In what cases must you join husband and wife in an action?

A.—An action after marriage for a chose in action of the wife *dum sola*, must be brought by husband and wife. So, for a cause of action against a woman *dum sola*, who afterwards marries, the action must be against both. For torts to or by the wife, the husband and wife must be joined. So for injury to her property *before* marriage. So in all cases where the wife is executrix they must both be joined: (see Arch. New C. L. Pract. 25, 29, 2nd edit.)

Q.—In the case of seduction, who is the proper party to bring the action, and what action must be brought?

A.—An action for seduction cannot be maintained by the parents of the seduced, as such, nor by the daughter herself (for *volenti non fit injuria*); but it must be brought by her master or other employer, and a father may sue in the character of an employer, if the daughter was living at home at the time of the injury committed, and in his service. The form of action may be either trespass or on the case: (3 Steph. Com. 536, 3rd edit.; Arch. N. P. 304.)

Q.—A. and B., partners, bring an action for a client C.; when the cause is at issue A. dies, B. continues the action, and fails. C. afterwards refuses to pay the costs incurred. Who should sue C. for the costs?

A.—B., the surviving partner, must sue C. for the costs: (Arch. New C. L. Pract. 27, 2nd edit.)

Q.—If there be two joint obligors in a bond, and one dies, against whom should the action be brought?

A.—The action should be brought against the surviving obligor: (Will. Per. Pro. 226.) For it is a rule, that in case of a joint contract respecting personalty, if one of the parties die, his executor or administrator is, at law, discharged from liability.

Q.—A testator dies leaving a right of action for money due to him upon bond, and also a right of action for libel or slander. Can his executors maintain an action in respect of both or either and which of the above rights of action of their testator?

A.—The executors may sue on the bond, but they cannot sue for the libel or slander; the maxim *actio personalis moritur cum persona* applying in the last case: (see Broom's Max. 703 to 708, 2nd edit.; and see ante, pp. 26, 27.)

Q.—How must a corporation aggregate sue or defend?

A.—A corporation aggregate sues or defends by attorney, appointed under its common seal: (Co. Lit. 66 b.; 3 Steph. Com. 127, 128, 3rd edit.)

Q.—For any debt due to a bankrupt previously to his bankruptcy (in which debt he is personally interested), who should sue before assignment of his effects, and who after such assignment?

A.—For a debt due to a bankrupt previously to his bankruptcy (in which debt he is personally interested), all the assignees must join in suing: (see sect. 141 of 12 & 13 Vict. c. 106; Arch. New C. L. Pract. 27, 2nd edit.) But from the wording of the 40th section of the above act, it would seem that if the creditors' assignees had not been appointed, the official assignee should bring the action alone. The point does not rest upon the assignment, because there is now no actual assignment of the effects to

the assignees, for they vest in them by virtue of the appointment : (see sects. 141, 142.)

**Q.**—Who is the proper party to sue on a contract, the party with whom it is made, or the party from whom the consideration moves: for instance, if A. on behalf of B. makes a contract with C., and on breach by C., who is to sue, A. or B. ?

**A.**—The proper person to sue on a contract is he from whom the consideration moves. If A., on behalf of B., makes a contract (not under seal) with C., and the contract is broken ; and if B. (who is the principal) was disclosed to C., then B. is the proper party to sue on the contract in his own name. If, however, he were not disclosed, either A. (the agent) may sue upon the contract, or B. may at any time come forward and sue upon it. But the right of B. to sue C. will be subject to any set-off C. may have against A., if C. dealt with A. as the principal : (see Smith's Merc. Law, 168, 5th edit.)

**Q.**—Would it make a difference if the contract were under seal, or if in writing and not under seal ? (a)

**A.**—Where a contract is in writing, under seal, it is a general rule of law that only those who are parties or privies to the deed can sue upon it : (Smith's Merc. Law, 5th edit.) By the 8 & 9 Vict. c. 106, however, it is enacted, that, under an indenture executed after the 1st October, 1845, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture : (sect. 5.) The answer to the latter part of the question has already been given in the next preceding answer.

**Q.**—In an action against executors for a debt due by their testator, which of the executors should be joined as defendants ?

**A.**—All the executors or administrators who have proved the will, or administered, must be made defendants : (Arch. New C. L. Pract. 32, 2nd edit.)

**Q.**—A. dies, and by his will appoints B. and C. to be his executors, and they prove his will : B. afterwards dies, leaving C. him surviving. C., the surviving executor, then dies intestate, and D. becomes administrator of his effects. Debts due to A. remain outstanding, and for the recovery of them actions become necessary: can such actions be maintained by D., or who is the proper party to bring them ?

**A.**—The actions cannot be maintained by D., because he being only administrator of C., does not represent the testator A. ; but *administration de bonis non* must be taken out ; that is, administration to such of the goods of A. as are not administered to by his executors, and the administrators thereunder may bring the actions : (see 2 Steph. Com. 243 ; Matthew's Guide to Exors. 306, 2nd edit.)

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(a) Also asked in the following form :—**Q.**—At common law, where a deed is made *inter partes*, can a person beneficially interested in the covenants, but who is not a party to the deed, maintain an action on the deed ?

## NOTICE BEFORE ACTION.

*Question.*—Is it necessary in any and what cases, previously to the commencement of an action, to give notice to the opposite party, in order to complete the cause of action? If any notice be necessary, state the consequences of the plaintiff failing, upon the trial, to prove the service of a notice.

*Answer.*—In actions against justices of the peace for anything done by them in the execution of their duty, notice must be given (11 & 12 Vict. c. 44): so in actions against any officer of the army, navy, marines, customs, or excise, or against any persons acting under the direction of the Commissioners of Her Majesty's Customs for anything done in the execution of their offices (3 & 4 Will. 4, c. 53.) There are numerous other Acts of Parliament which require notice previous to the commencement of an action, which it is unnecessary to mention here. To establish uniformity the 5 & 6 Vict. c. 97, enacted, that in all cases where notice of action was required, it should be given one calendar month before the commencement of the action; but this act only applies to statutes previously passed. If the plaintiff fail to prove the notice, he cannot recover: (see *Smith's Action at Law*, 52 to 55, 5th edit.; *Arch. New C. L. Pract.* 348, 2nd edit.)

*Q.*—What should be done before commencing an action of trover?

*A.*—Where the defendant is in possession of the goods claimed, and there is no evidence of an actual conversion, a demand of the goods should be made, and if the defendant refuse to deliver them up, this will be evidence of a conversion so as to support the action: (*Arch. N. P.* 457, 458; *Pat. & Mac. Com. L. Pr.* 65.)

*Q.*—In an action against a constable who has acted under a warrant, what demand must be made?

*A.*—If an action be brought against a constable, or any one acting in his aid, for anything done in obedience to the warrant of a justice of the peace, a *demand in writing* of the perusal and copy of the warrant, signed by the plaintiff or his attorney, must, by 24 Geo. 2, c. 44, s. 6, be made or left at his usual place of abode; the effect of which is, that, if such perusal and copy be not granted within six days, the plaintiff may commence his action against the constable alone; but, if granted within six days, he cannot sue the constable without joining the justice who made the warrant as a co-defendant, and then the mere production of the warrant at the trial will entitle the constable to a verdict, though, if the justice had no jurisdiction, the plaintiff will recover an indemnity from him: (*Smith's Action at Law*, 53, 5th edit.)

## INTERPLEADER.

*Question.*—In what cases where there are adverse claims, may a defendant apply for protection under the Interpleader Act ?

*Answer.*—The 1 & 2 Will. 4, c. 58, s. 1, gives jurisdiction to the courts in assumpsit, debt, detinue, and trover only. And when a declaration against an applicant contained a count in case, as well as a count in trover, the court held they had no jurisdiction ; as they must decide upon the whole matter, and had no jurisdiction over the count in case, they could not interfere : (Arch. New C. L. Pract. 391, 393, 2nd edit.) The 1 & 2 Will. 4, c. 58, s. 6, also gives interpleader at the instance of the sheriff.

*Q.*—How does the defendant apply, and at what period should he do so ?

*A.*—The application may be made to the court, or a judge at chambers ; and will be either by motion or summons : if made to the court, it must be made to the court in which the action against the applicant is pending. The application must be made after declaration, but before plea, and the affidavit must show it. To support this application it is necessary for the defendant to show, by affidavit or otherwise, that he does not claim any interest in the subject matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued, or is expected to sue for the same, and that he does not collude with such third party, and is ready to bring the subject matter of the action into court : (Arch. New C. L. Pract. 391, 395, 2nd edit.)

*Q.*—Suppose a party has money or goods in his possession belonging to A., and he is called upon to retain them to answer a claim of B. and C., has he any and what means of obtaining relief ?

*A.*—If a party having money or goods in his possession belonging to A., and is called upon to retain them to answer a claim of B. and C., he may, on one of them suing him, on application to one of the Superior Courts, obtain relief under the Interpleader Act, 1 & 2 Will. 4, c. 58 : (3 Steph. Com. 716, 3rd edit.)

*Q.*—What are the cases in which the courts grant a rule of interpleader at the instance of the sheriff ?

*A.*—Where a claim is made to any goods or chattels taken or intended to be taken in execution, under any process from the courts of law at Westminster, and the courts of Common Pleas at Lancaster and Durham, or to the proceeds or value thereof, the sheriff or other officer may apply to the court from which the process issued, and as well before as after any action brought against him, for a rule of interpleader. But it is only in cases where a claim has been actually made to the goods seized, or the produce of them by some third person, that the court in strictness can grant a rule of interpleader at the instance of the sheriff : (see Arch. New C. L. Pract. 255, 2nd edit.)

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## COMMENCEMENT OF LITIGATION.

*Practice of the Courts.*

*Question.*—What is the form of the commencement of an action at common law ?

*Answer.*—All personal actions are now commenced by suing out a writ of summons: (see 15 & 16 Vict. c. 76, s. 2.)

*Q.*—What is the first step an attorney should take when applied to to commence an action ?

*A.*—The first step an attorney should take when applied to to commence an action is, to address a letter to the person intended to be sued, stating the claim for which instructions have been received to sue him, unless there is cause to believe the party to be sued would, if he had notice of the intended action, keep out of the way. But the first step in the action itself, is suing out a writ of summons: (see *supra*.)

*Q.*—When an action is brought against several persons for the same cause of action, should you insert all the names in one writ, or is there any number of names to which you are limited ?

*A.*—The writ of summons is to contain the names of all the defendants liable for the same cause of action: (see 15 & 16 Vict. c. 76, s. 4.)

*Q.*—In a writ of summons would it be a sufficient description if the defendant were described as “A. B. of the City of London;” and what description is required by the statute ?

*A.*—The above description would not be sufficient; for the Common Law Procedure Act, 1852, requires the “place and county” of the residence or supposed residence of the defendant to be mentioned in the writ and copy served: (15 & 16 Vict. c. 76, s. 2.)

*Q.*—Several defendants are partners in trade: is it necessary to serve each personally with a copy of the writ of summons to compel an appearance, or will service on one for himself and his partners, the other defendants, be good ?

*A.*—All the partners, defendants, must be served personally; you cannot serve one for all.

*Q.*—Can a plaintiff join more than one cause of action on the same suit ? State some of the causes usually joined.

*A.*—Causes of action of whatever kind, provided they be by and against the same parties, and in the same rights, may be joined in the same suit, except replevin and ejectment; but the court has power to prevent the trial of different causes of action together, if such trial would be inexpedient, and in each case separate records may be ordered to be made up, and separate trials to be had: (see Pat. & Mac. Com. L. Pract. 136.) The most usual causes joined are for goods sold and delivered, for work and materials provided, for money paid by the plaintiff for the defendant, and on accounts stated.

*Q.*—Was it ever necessary, and is it now necessary, in a writ of summons to mention the particular cause of action in respect of which the suit is brought ?

A.—Before the Common Law Procedure Act, 1852, it was necessary to state the cause of action in the writ of summons; but since the passing of the above act (15 & 16 Vict. c. 76, s. 3) it is no longer necessary to mention any form or cause of action in any writ of summons, or in any notice of writ of summons issued under authority of this act. *but as regards summons for divorce or probate or ecclesiastical jurisdiction the*

Q.—On what day must a writ of summons be dated, and in whose name must it be tested?

A.—It must be dated on the day it is issued; and it must be tested in the name of the Lord Chief Justice or Lord Chief Baron of the court from whence it issued, or, in case of vacancy of such office, then in the name of the senior puisne judge of the said court: (15 & 16 Vict. c. 76, s. 5.)

Q.—Within what period must a writ of summons (without renewal) be served?

A.—Within six months from the day of the date thereof, including the day of such date: (15 & 16 Vict. c. 76, s. 11.)

Q.—Where several defendants live in different counties, can they all be served with one writ of summons?

A.—The writ may be served in any county (15 & 16 Vict. c. 76, s. 14), and it must contain the names of all the defendants: (sect. 4.) But as each defendant is entitled to see the original writ at the time of service, duplicate originals, or *concurrent writs* as they are called, may be issued at any time during the concurrency of the original writ, and they remain in force during the period the original writ is in force: (sect. 9.)

Q.—Must the service of a writ of summons on a defendant be personal, or will mere efforts to serve him be sufficient to enable the plaintiff to proceed in his suit? State the practice as it now stands under the Common Law Procedure Act, 1852.

A.—The writ of summons, whenever practicable, must be served personally; but the plaintiff may apply on affidavit to the court out of which the writ issues or to a judge; and in case it shall appear to such court or judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of the defendant, or that he wilfully evades service of the same, and has not appeared thereto, it shall be lawful for such court or judge to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the court or judge may seem fit: (15 & 16 Vict. c. 76, s. 17.)

Q.—How must writs be indorsed?

A.—They must be indorsed with the name and place of abode of the attorney actually suing out the same, and if he act as agent for an attorney in the country, then the name and abode of the attorney in the country must be added, and if the writ is not issued by an attorney, then a memorandum stating that it was sued out by the plaintiff in person must be indorsed on it, mentioning the plaintiff's address. Also, upon the writ and copy of any writ served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ, copy and service, and attendance to receive debt and costs, and it shall be further stated, that upon payment thereof, within four days, to the plaintiff or his attorney, further proceedings will be stayed. An indorsement of service must also be made: (see 15 & 16 Vict. c. 76, ss. 6 to 8, 15.)

**Q.**—Within what time after service of a writ of summons, is it necessary to indorse on such writ the day of the week and month of such service?

**A.**—Within three days, at least, after service of the writ, the person serving the same must indorse on it the day of the week and month of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed under this act; and every affidavit of service of such writ shall mention the day on which such indorsement was made: (see 15 & 16 Vict. c. 76, s. 15.)

**Q.**—If such indorsement be omitted, what is the consequence to the plaintiff?

**A.**—He cannot proceed under the provisions of the act in case of non-appearance: (sect. 15.) That is, he cannot proceed to sign judgment and issue execution in the case of non-appearance.

**Q.**—In what cases may a special indorsement be made on a writ of summons of the particulars of the plaintiff's claim, and what is the consequence of an omission to make such indorsement, should the defendant not appear, having been served with the writ?

**A.**—By sect. 25 of the 15 & 16 Vict. c. 76, it is provided, that "in all cases where the defendant resides within the jurisdiction of the court, and the claim is for a debt or liquidated demand in money, with or without interest, arising upon a contract express or implied, as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt, or on a bond or contract under seal, for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt, or on a guarantee, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note, the plaintiff shall be at liberty to make upon the writ of summons and copy thereof, a special indorsement of the particulars of his claim, in the form contained in the schedule (A) to this act annexed, marked No. 4, or to the like effect; and when a writ of summons has been indorsed in the special form hereinbefore mentioned, the indorsement shall be considered as particulars of demand, and no further or other particulars of demand need be delivered, unless ordered by the court or a judge."

If the defendant does not appear to a writ so specially indorsed, the plaintiff may, on filing the necessary affidavits and a copy of the writ, sign final judgment: (sect. 27.)

If the plaintiff has neglected to make such special indorsement when it might have been made, he will not be entitled to the costs of the declaration, upon judgment being signed in default of plea: (sect. 28.)

**Q.**—In case of a writ of summons issued against a corporation aggregate, how is the service to be effected?

**A.**—It may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation: (see sect. 16 of 15 & 16 Vict. c. 76.)

**Q.**—In the event of its being necessary to issue a concurrent writ of summons, can a writ for service in England be issued and marked as a concurrent writ, with one for service in France?

**A.**—Yes; for by the 15 & 16 Vict. c. 76, s. 22, it is provided, that a writ for service within the jurisdiction may be issued and marked as a concurrent writ, with one for service out of the jurisdiction, and a writ for service out of the jurisdiction may be issued and marked as a con-

current writ, with one for service within the jurisdiction. But it seems a concurrent writ can only be issued once on the original writ: (*Cole v. Sherrard*, 26 L. T. Rep. 138.)

Q.—If the defendant cannot be found or served with a writ of summons, what steps must be adopted to enable the plaintiff to proceed?

A.—The plaintiff's attorney must make reasonable efforts to effect personal service of the writ of summons, and, if these are unsuccessful, he should, if possible, bring the writ to the defendant's knowledge: he may then, upon affidavit of all the circumstances, apply to the court out of which the writ issues or to a judge, and, if it appears that such reasonable efforts have been made, and either that the writ has come to the knowledge of the defendant, or that he wilfully evades service of the same and has not appeared thereto, such court or judge will order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as the court or judge may think fit: (see sect. 17 of 15 & 16 Vict. c. 76.)

Q.—Set forth the ordinary proceedings in an action at law, from its commencement to its termination.

A.—An action is commenced by writ of summons, a copy of which is served on the defendant, or an order to proceed, as if personal service had been effected, is obtained (see *supra*); in either case, if the writ is specially indorsed, judgment is obtained by default, unless the defendant enter an appearance, and execution may be issued on the judgment at the expiration of eight days from the last day for appearing. If the defendant appears, the pleadings commence: the plaintiff delivers declaration, with a notice to plead in eight days, otherwise judgment, and the defendant pleads or demurs, or the plaintiff signs judgment: if the defendant pleads or demurs, the plaintiff may join issue, or he may reply without joining issue, the subsequent pleadings ending, however, in a joinder of issue. Notice of trial is then given, the cause set down, and record entered; each party then "gets up" his evidence, gives notice to inspect, and admit, and to produce, subpoenas his witnesses and delivers his briefs, and the cause is then tried in due course. After the verdict, the successful party signs judgment, taxes his costs, and, if necessary, enforces his judgment by execution. If the issue joined is one of law, it is set down for argument in the *special paper*, and demurrer books are delivered to the judges, and it is argued before the court. There are also frequently various other interlocutory proceedings depending on the particular circumstances of the case, which it is unnecessary to enter into here.

Q.—How long does a writ of summons remain in force, and how may it be continued, and on what days and at what hours can it be served?

A.—A writ of summons remains in force for six months from the date thereof, including the day of such date; but if the defendant has not been served with such writ, the original or concurrent writ of summons may be renewed at any time before its expiration for six months from the date of such renewal, and so from time to time during the currency of the renewed writ, by being marked with a seal for that purpose: (see 15 & 16 Vict. c. 76, s. 11.) The writ may be served at any hour and on any day (except Sunday) so long as it remains in force.

Q.—If a debtor absconds before writ issued, can you take any and what proceedings, so as to obtain a judgment, or what course should a creditor pursue?



A.—Formerly, resort must have been had to outlawry in such a case ; but the practice of outlawry on *mesne process* is abolished by sect. 24 of 15 & 16 Vict. c. 76, and in lieu of it a form of writ of summons has been given for service out of the jurisdiction, the defendant not being in Scotland or Ireland. The writ is similar to the writ of summons for service within the jurisdiction, except that it purports to be issued for service out of the jurisdiction, and the time specified for appearance and payment is regulated by the distance the defendant may be from England. After this period has elapsed, the plaintiff will be allowed to proceed in manner, and subject to such terms as are allowed by the court or judge, provided he establish by affidavits—

1. That there is a cause of action.
2. That it arose within the jurisdiction, *or* in respect of the breach of a contract made *within* the jurisdiction.
3. That the writ was personally served on the defendant, *or* reasonable efforts made to effect personal service, and that it came to his knowledge ; and *either* that the defendant wilfully neglects to appear to such writ, *or* that he is living out of the jurisdiction of the said courts in order to defeat and delay his creditors : (Smith's Action at Law, 67, 2nd edit. ; and see *Firmin v. Perry*, 27 L. T. Rep. 72 ; *Biret v. Pigot*, 33 L. T. Rep. 149.)

Q.—What is the course of proceeding under the Common Law Procedure Act, 1852, in actions against British subjects resident abroad ?

A.—By the Common Law Procedure Act, 1852, it is provided that, in case any defendant being a British subject residing out of the jurisdiction of the superior courts, not being in Scotland or Ireland, it shall be lawful for the plaintiff to issue a writ of summons, in the form given by the act, indorsed according to the said form, which purports that such writ is issued for service out of the jurisdiction, and the time specified for appearance is regulated by the distance the defendant may be from England ; and in like manner in the indorsement of the amount claimed, the time limited for payment will be the time limited for appearance. After this period has elapsed, the plaintiff will be allowed to proceed in such manner and subject to such terms and conditions as the court or a judge may think fit, provided it be established by affidavits to the effect detailed in the last preceding answer. In fact, the two questions are in effect the same. The former question was asked before the Common Law Procedure Act, 1852, and this is the form in which it has since that time been repeated.

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## INJUNCTION.

*Question.*—Can a person obtain an injunction at law, and in what cases ?

*Answer.*—Yes ; in all cases of breach of contract, or other injury, where the party injured is entitled to maintain and has brought an action, he may claim a writ of injunction against the repetition or continuance of such breach of contract, or other injury, or the committal of any breach

of contract, or injury of a like kind, arising out of the same contract, or relating to the same property or right: (17 & 18 Vict. c. 125, s. 79, *et seq.*) The injunction may be claimed either by an indorsement on the writ of summons, or it may be applied for *ex parte* at any stage of the cause, either before or after judgment: (*Id.*) And an injunction, even before this act, might have been obtained at law in cases of infringement of patents: (15 & 16 Vict. c. 83, s. 42.) *Injunctions may be enforced against corporations by attaching directors or officers or by sequestration where to be issued in form like sequestrations issued upon sequestrations issued out of Chancery. Com. Law Annot. Vol. 1860*  
*May come in and report of costs of preparing issuing & serving same*

## ARREST—BAIL.

*Question.*—An act passed for the abolition of arrest: do you understand that the power of arrest at the commencement of an action is in all cases taken away, or is there any excepted case?

*Answer.*—The 1 & 2 Vict. c. 110, does not abolish arrest in all cases at the commencement of an action, for if the defendant is liable to arrest, and the debt or damages amount to twenty pounds, and there is probable cause to believe the defendant is about to quit England unless arrested, a judge of one of the superior courts may order his arrest at the commencement of the action: (see sect. 3.)

*Q.*—Can a defendant now be arrested on *mesne process*, and, if so, under what circumstances?

*A.*—Yes: see further *infra*.

*Q.*—When it is sought to arrest or detain a defendant under the provisions of the act for the abolition of arrest on *mesne process*, what is essentially necessary to be stated in the affidavit?

*A.*—It must be shown to the satisfaction of a judge of one of the superior courts, by the affidavit of the plaintiff, or of some other person, that such plaintiff has a cause of action against the defendant to the amount of twenty pounds or upwards, or that he has sustained damage to that amount, and that there is probable cause for believing that the defendant is about to quit England, unless he be forthwith apprehended: (1 & 2 Vict. c. 110, s. 3.)

*Q.*—A plaintiff apprehends, after service of a writ, that the defendant is going out of the jurisdiction of the court from whence the writ issues: is there any means of stopping him, and how is it to be effected? and if the defendant is arrested, has he any mode of getting out of custody if he intends to dispute the debt?

*A.*—If the plaintiff apprehends, after serving the writ, that the defendant is going out of the jurisdiction, he may obtain (on the usual affidavit), (see *sup.*) from a judge of one of the superior courts, a special order directing that such defendant so going out of the jurisdiction shall be held to bail for such sum as such judge shall think fit, not exceeding the amount of the debt or damages; and thereupon the plaintiff may, within the time which shall be expressed in such order, but not afterwards, sue out one or more *writ* or *writs of capias* into one or more different counties, as the case may require, against the defendant so to be held to bail:

(1 & 2 Vict. c. 110, s. 3.) The writ is directed to the sheriff of the county in which the defendant is supposed to be, and a warrant upon it is obtained; the warrant and a copy of the writ are then given to the officer to whom the warrant is directed, and the arrest will thereupon be made: (see Arch. New C. L. Pract. 40 to 44, 2nd edit.) If the defendant intends to dispute the debt, he may get out of custody either by giving bail to the sheriff, or he may deposit with him the sum sworn to, together with ten pounds for costs: (see Smith's Action at Law, 218, 5th edit.; see also stat. 14 & 15 Vict. c. 52.)

Q.—Point out any defects or irregularity in the proceedings which would entitle a defendant to apply to set them aside.

A.—On the execution of the writ, a true copy of it must be delivered to the defendant to give him precise information of the demand against him; and, if this be not done, he may obtain his discharge, or the bail bond would be cancelled: (see Smith's Action at Law, *ubi sup.*) So, for any defect in the affidavit of debt itself, either in the body or the jurat, the court, upon application, will discharge the defendant or order the bail bond to be delivered up to be cancelled: (see Arch. New C. L. Pract. 45, 2nd edit.)

Q.—How would you proceed to hold a defendant to bail on an affidavit sworn out of England?

A.—If sworn in Scotland or Ireland, it should be sworn before a commissioner appointed in pursuance of the statute 3 & 4 Will. 4, c. 42, and there should be an affidavit authenticating the commissioner's signature; the defendant may then be held to bail in the ordinary way. Also, affidavits made in foreign countries before mayors or other magistrates there, attested and certified by a notary public, and his authority to administer an oath also certified, may be used in the courts of this country: (see Arch. New C. L. Pract. 607, 608, 2nd edit.) The 18 & 19 Vict. c. 42, enables British diplomatic and consular agents abroad to administer oaths and do notarial acts.

Q.—Are there any classes of persons privileged from arrest? if so, enumerate them.

A.—At the passing of the 1 & 2 Vict. c. 110, the only exceptions from arrest under civil process were the following: The royal family, the officers and domestics of the royal household, particularly if they are going abroad on the Queen's service; peers, peeresses, and members of Parliament, foreign ambassadors and their domestic servants. Formerly, an attorney was privileged from arrest upon *mesne process*. But this is no longer so; since the 1 & 2 Vict. c. 110, he is as much amenable to arrest, if he be going abroad, as any other person, for the reason of his privilege, namely, the attendance of the court of which he is an officer, does not apply in such a case: (see Arch. New C. L. Pract. 40, 2nd edit.)

Q.—Can a clergyman be arrested on civil process whilst performing divine service on any other day than Sunday, or in going to or returning from the performance thereof?

A.—A clergyman cannot be arrested at any time whilst performing divine service, or going to or returning from the performance thereof: (see Arch. New C. L. Pract. 328, 2nd edit.)

Q.—When a writ of *capias* is granted by a judge for the arrest of a defendant, is such writ of *capias* the commencement of the action? if not, how otherwise is the action commenced?

*A.*—The writ of *capias* is not the commencement of the action, but it is commenced by writ of summons: (see Arch. New. C. L. Pract. c. 41, 2nd edit.)

*Q.*—State the different methods by which a defendant may obtain his discharge upon arrest.

*A.*—He may give bail to the sheriff, or he may deposit the sum sworn to, with ten pounds for costs: (Smith's Action at Law, 218, 5th edit.) So, by the 6th section of the 1 & 2 Vict. c. 110, the defendant may apply to the court in which the action is commenced, or to a judge, for a rule or order on the plaintiff to show cause why the defendant should not be discharged out of custody, and such rule or order may either be made absolute or discharged: (see Arch. New C. L. Pract. 44, 2nd edit.)

*Q.*—Up to what stage of the proceedings in a cause may a defendant be arrested upon a *capias* under a judge's order for that purpose?

*A.*—At any time after the commencement of the action, and before final judgment obtained therein: (see sect. 5 of 1 & 2 Vict. c. 110.)

*Q.*—What is a bail-bond, and in what instances can the plaintiff sue upon it?

*A.*—A bail-bond is a bond given to the sheriff by a defendant when arrested under a *capias*. The bail-bond is executed by the defendant himself and two sureties, and is conditioned for the appearance of the defendant in the court out of which the process issued, in eight days after the arrest, to answer the plaintiff in a certain action. And if the defendant fail in performing the condition of it, by putting in and perfecting special bail, or rendering himself to prison in discharge of his bail, an action may be commenced upon it against him and his sureties, either by the sheriff or the plaintiff, if the bond be assigned to him: (Arch. New C. L. Pract. 47, 2nd edit.)

*Q.*—What is the difference between bail above and bail below?

*A.*—Bail below is given to the sheriff, and is that which the defendant puts in when arrested on a *capias*; bail above, or special bail, are persons whom the defendant procures to become his sureties for the ultimate payment of the debt and costs in the action, in the event of judgment passing against him, or, as an alternative, that he shall surrender himself to prison: (Holth. Law Dict. 2nd edit.) And bail to the sheriff cannot take the defendant and render him to custody as special bail may: (see Smith's Action at Law, 219, 222, 225, 5th edit.)

*Q.*—How is bail above put in when the defendant resides in the country?

*A.*—If the defendant resides in the country, bail above is put in before a commissioner; after which the bail piece is transmitted to London and filed, and the bail is not considered *put in* till this has been done: (Smith's Action at Law, 223, 5th edit.)

*Q.*—Can an attorney or an attorney's clerk be bail in a civil action, under any and what circumstances?

*A.*—Practising attorneys and their clerks cannot be bail in civil actions, except for the purpose of merely rendering the defendant into custody: (Smith's Action at Law, 222, 5th edit.)

*Q.*—State some of the most common objections to the sufficiency of bail above.

*A.*—Bail above may be objected to on the following grounds:—that the bail are attorneys or attorneys' clerks; that they are sheriff's officers

engaged in the execution of process; that they are not housekeepers or freeholders; that the bail is a peer or member of the House of Commons, or an ambassador, or domestic servant of an ambassador, or servant in the Queen's household, or other privileged person; that the bail are indemnified by the defendant's attorney; that the bail are hired; that they are not worth the amount of property for which they come to justify: (see Arch. New C. L. Pract. 51, 2nd edit.)

Q.—Suppose bail, who have justified in an action, are desirous of being discharged from their liability, have they any and what means of doing so?

A.—Yes; they may render their principal in their own discharge. And bail, though rejected, shall be allowed to render the principal without entering into a fresh recognizance: (Arch. New C. L. Pract. 55, 2nd edit.)

Q.—Is there any, and, if any, what difference between the liability of bail above, *i. e.*, bail to the action, and bail on a writ of error?

A.—The bail to the action are liable together only to the sum sworn to by the affidavit of debt, and the costs of suit, not exceeding in the whole double the amount of their recognizance: (see Chitt. Arch. 808, 9th edit.) While the bail in error are bound to prosecute the proceedings with effect, and also to satisfy and pay (if the judgment be affirmed or the proceedings in error be discontinued by the plaintiff therein) all and singular the sum or sums of money and costs adjudged or to be adjudged on the former judgment, and all costs and damages to be also awarded for the delaying of execution, not exceeding double the sum adjudged to be recovered by the said judgment (except in the case of a penalty, then in double the sum really due and double the costs): (see Arch. New C. L. Pract. 476, 2nd edit.; Smith's Action at Law, 189, 5th edit.) Again, bail to the action may render their principal in their own discharge, which bail in error cannot do.

Q.—A defendant having been arrested and given bail, afterwards makes arrangements with the plaintiff and gives him a cognovit, without the knowledge of the bail. The terms in the cognovit give the defendant additional time for payment. Does this circumstance affect the bail in any way?

A.—Yes; as the cognovit gives the defendant additional time, without the knowledge of the bail, they are discharged from their liability: (see *Thomas v. Young*, 15 East, 617; *Bowsfield v. Tower*, 4 Taunt. 456.)

Q.—Are bail above discharged from their liability in any and what cases by the acts or defaults of the plaintiff?

A.—Yes; by any indulgence shown by him to the principal, without the consent of the bail or one of them, which puts them in a different situation from that which they placed themselves by entering into the recognizance: (see *Howard v. Bradbury*, 3 Dowl. 92; and see *sup.*)

Q.—In an action on a bill of exchange by the indorsee against the acceptor, is the drawer competent to become bail; and is the acceptor of a bill of exchange competent to justify as bail in action against the drawer?

A.—There is no reason why the drawer should not become bail in an action by the indorsee against the acceptor, or the acceptor of a bill of exchange should not justify as bail in an action against the drawer if otherwise unexceptionable.

## ATTACHMENT.

*Question.*—What is the nature of a writ of attachment ; and when it is issued against the sheriff to whom is it directed ?

*Answer.*—A writ of attachment is a judicial writ which commands a taking, apprehending, or seizing : (Holth. Law Dict.) A party guilty of a contempt of court is punishable by attachment. In ordinary cases the writ is directed to the sheriff ; but attachments against the sheriff are directed to the coroner : (see Arch. New C. L. Pract. 634, 641, 2nd edit.)

*Q.*—Name some of the cases in which the court will grant an attachment.

*A.*—Disobeying a rule of court is a contempt of that particular court and punishable by attachment. An attachment will lie for a libel on the court, also against the sheriff for not returning the writ, or bringing in the body : (see Arch. New C. L. Pract. 634, 636, 2nd edit.) An attachment also lies against a witness for non-attendance at the trial, if served with a subpoena, requiring his attendance : (*Id.* 121.)

*Q.*—What service is necessary to enable a party to obtain an attachment ?

*A.*—Personal service is necessary in order to be able to proceed by attachment. There are, however, circumstances which are deemed equivalent to personal service ; as, if the party admits the rule to be then in his possession, although not personally served ; or where he prevents an actual personal service by violence : (see Arch. New C. L. Pract. 637, 2nd edit.) So, the party required to attend as a witness at a trial must be personally served with a copy of the subpoena and the original at the same time shown to him : (*Id.* 121.)

*Q.*—How do the courts proceed in cases of contempt ?

*A.*—They punish the party guilty of it by attachment : (Arch. New C. L. Pract. 634, 2nd edit.)

## APPEARANCE.

*Question.*—At what period must a defendant appear to an action ?

*Answer.*—The appearance of the defendant should be regularly entered within eight days after service of the writ, inclusive of the day of service, as directed by the writ, otherwise the plaintiff may proceed to judgment and execution. The defendant, however, may appear at any time before judgment for want of appearance is actually signed against him : (see Arch. New C. L. Pract. 61, 2nd edit.)

**Q.**—If an action be brought against an infant, how must he appear to defend it ?

**A.**—An infant must defend by guardian. If he appear by attorney, and judgment be given against him, it will be error. The guardian is appointed upon petition, in the same way a *prochein amy* is appointed : (see Arch. New C. L. Pract. 342, 343, 2nd edit., and *ante*, p. 32.)

**Q.**—If a *feme covert* be sued alone, how must she appear, and why so ?

**A.**—She must appear in person, and not by attorney ; otherwise she cannot avail herself of her coverture : (see Arch. New C. L. Pract. 338, 2nd edit.)

## VENUE.

**Question.**—What is the meaning of the word “venue” ?

**Answer.**—Venue (from *vicinetum* or *vicinia*). The county in which an action is intended to be tried, and from which the jurors are accordingly to be summoned, is so called. This county, or *venue*, as it is termed, when fixed upon by the plaintiff, is inserted in the margin of his declaration, which is termed “*laying the venue*” in such a county ; and the action itself is then said to be “laid” or brought “within that county :” (Holth. Law Dict. 2nd edit. ; Smith’s Action at Law, 76, 5th edit. ; Arch. New C. L. Pract. 647, 2nd edit.)

**Q.**—Can the defendant change the venue ; and, if so, in what actions ; and what are the necessary steps to be taken by him ?

**A.**—Formerly, in transitory actions (see *ante*, p. 6), the defendant might have changed the venue to another county upon affidavit that the cause of action, if any, arose in another county, and not in the county in which the venue is laid, or elsewhere out of that other county. This was called the common affidavit, and obtained as a matter of course. But this could not be done in all cases of transitory actions ; for instance, in actions on bills of exchange, promissory notes, or specialties, the reason of which is that there is a maxim of law—*contractus est nullius loci*. But the court would allow it to be changed in such cases on a special affidavit, stating a good reason, as that a fair trial could not be had in the county in which the venue was laid : (see Smith’s Action at Law, 98, 5th edit.) And now, by Rule Gen. 18, no venue is to be changed without the special order of the court, or a judge. The affidavit in support of the rule or summons should state all the circumstances relied upon : (see Smith’s Action at Law, 99, 5th edit. ; Arch. New C. L. Pract. 526, 2nd edit.)

**Q.**—Where a defendant changes the venue upon the usual affidavit, what steps should the plaintiff take to bring back the venue ?

**A.**—The plaintiff may bring back the venue, on undertaking to give material evidence in the county in which he first laid it : (Smith’s Action at Law, 98, 5th edit.)

**Q.**—If the plaintiff bring back the venue, when changed by the defendant, upon the usual undertaking to give material evidence within the county, and fails to do so, what will be the consequence at the trial?

**A.**—If the defendant fails to give material evidence in the county in which it was first laid, he will be nonsuited : (see Smith's Action at Law, *ut sup.*)

**Q.**—In an action against a justice of the peace, where must the venue be laid?

**A.**—In actions against a justice of the peace for anything done by him in the execution of his office, the venue must be laid in the county where the act complained of was committed : (Arch. New C. L. Pract. 349, 2nd edit. ; 11 & 12 Vict. c. 44.)

**Q.**—In an action of ejectment, where must the venue be laid?

**A.**—In ejectment the venue is of course local, but it may be changed by order of a judge : (see 15 & 16 Vict. c. 76, s. 182 ; Smith's Action at Law, 239, 5th edit.)

*judgment not given, unless venue ordered by court - C. L. P. A. 1860-*

## PLEADINGS.

**Question.**—When the writ has been served, what is the next step the plaintiff takes, and what must he take care is the state of the parties before he takes such step?

**Answer.**—As soon as the defendant has appeared, or leave obtained to proceed as if he had appeared, the pleadings commence ; the first step in which is the delivery of the declaration by the plaintiff. Care must be taken that the parties are properly joined in the action, otherwise a plea in abatement may be pleaded by the defendant : (see Smith's Action at Law, 70, 78, 5th edit.) *The joinder of too many parties is not fatal, but the unsuccessful party shall be entitled to his costs occasioned by such joinder of parties in it.*

**Q.**—What are the names of the different pleadings in an action of assumpsit?

**A.**—They are the following :—the *Declaration* by the plaintiff ; the *Plea*, containing the defendant's answer to the declaration ; the *Replication*, the plaintiff's answer to the plea ; the *Rejoinder*, the defendant's answer to the replication ; the *Surrejoinder* ; the *Rebutter* ; the *Surrebutter*, and so on. The pleadings seldom reach to surrebutter, but they sometimes do, and there is nothing to prevent their going beyond it. But the steps after *Surrebutter* have no distinctive names : (see Smith's Action at Law, 73, 77, 83, 5th edit.)

**Q.**—Writ served in any term or vacation, within what time should the plaintiff declare, to prevent judgment of *non pros.*?

**A.**—The plaintiff's time for taking that step extends, in the opinion of the best authorities, till the conclusion of the term next after the appearance entered. If the plaintiff does not declare within that time the defendant may give him notice to declare within four days ; and in default of his so doing, or obtaining further time by judge's order, may sign judgment of *non pros.* And even if the defendant take no step



the plaintiff, if he remain inactive for a whole year after process becomes returnable, will be altogether out of court, and his action determined by sect. 58 of the 15 & 16 Vict. c. 76 : (see *Smith's Action at Law*, 88, 89, 5th edit.) No declaration or pleadings can be filed or delivered between the 10th of August and the 24th of October : (see *Arch. New C. L. Pract.* 9, 2nd edit.)

**Q.**—In what case must the declaration be filed, and in what cases must it be delivered ?

**A.**—In case of non-appearance of the defendant, where the writ of summons is not specially indorsed, it shall be lawful for the plaintiff, on filing an affidavit of personal service of the writ of summons, or a judge's order for leave to proceed under the provisions of 15 & 16 Vict. c. 76, and a copy of the writ of summons, to file a declaration indorsed with a notice to plead in eight days : (see sect. 28 ; *Arch. New C. L. Pract.* 64, 2nd edit.) In other cases the declaration is delivered.

**Q.**—Does it require any, and if any, what permission for the plaintiff to insert more than one count in his declaration ?

**A.**—By Rule Pl. H. T. 1853, s. 1, several counts for the same cause of action are forbidden, but a judge may allow them, subject to such terms as he may think fit, if they appear to be proper for determining the real question in controversy between the parties : (see *Smith's Action at Law*, 83, 5th edit.) But this rule is not strictly followed in practice.

**Q.**—Describe an issue.

**A.**—The issue is a transcript of the pleadings concluding with an award of the *venire facias*, which is shortly expressed in these words, "Therefore let a jury come," &c. The pleadings are entered in the order in which they have been pleaded, with their dates and numbers, and in separate paragraphs : (*Pat. & Mac. C. L. Pract.* 207.)

**Q.**—How is an objection to the *validity* of a pleading raised ?

**A.**—An objection to the validity of a pleading is raised by demurrer ; the demurrer admits the facts from which the law is inferred, but denies that a particular inference of law arises out of such facts. An issue of law is thereby raised, which is tried by the court in banc. : (see *Pat. & Mac. C. L. Pract.* 896 ; 3 *Steph. Com.* 575.)

**Q.**—What is the nature and effect of a demurrer ?

**A.**—A demurrer is a pleading denying the sufficiency, in point of law, of the plaintiff's right to recover, and it raises an issue of law, which is decided by the court, upon the determination of which the result of the action depends.\*

**Q.**—Can a defendant demur specially to a declaration ? How can he object to a declaration on the ground that it discloses no cause of action ?

**A.**—A defendant cannot demur specially to a declaration. Objections that pleadings are defective in form, &c., can no longer be taken by demurrer : (15 & 16 Vict. c. 76, ss. 50, 57.) If the declaration disclose no cause of action the defendant may demur to it, and where issue is joined upon such demurrer the court is to give judgment according to the very right of the case : (15 & 16 Vict. c. 76, s. 50 ; *Pat. & Mac. C. L. Pract.* 119, 896.)

**Q.**—Who are the proper parties to decide questions of fact in actions

brought in the superior courts ; and who are the proper parties to decide questions of law in the same courts ?

A.—Until recently, questions of fact were always decided by a jury ; and, subject to a provision to be presently mentioned, they are still the persons to decide thereon. But they are guided in their decisions by the judge at Nisi Prius, who decides points of law that arise on the trial, and explains to them the questions which require their determination.

The 17 & 18 Vict. c. 125, has, however, provided that the parties to any cause may, by consent in writing, leave the decision of any issue of fact to the court, provided the court, upon a rule to show cause, or a judge on summons, shall, in their or his discretion, think fit to allow the trial ; but the judges are empowered to make a general rule or order dispensing with the necessity of such allowance, either in all cases or in any particular class or classes of cases which may be defined in such rule or order : (see further, sect. 1.)

Issues of law raised by *demurrer* are determined by the court *in banco* : (see Smith's Action at Law, 71, 100, 107, *et seq.* 5th edit.)

Q.—A defendant demurs to part of a declaration, and pleads issuably to the remainder : what course must the plaintiff take, and how is the action to be continued ?

A.—If the defendant demurs to part of the declaration, it raises an issue of law which must be decided by the court. When it is intended to proceed to the argument of a demurrer, demurrer books must be made up and copies delivered to the judges, and the demurrer must then be set down in the special paper in the court in which the action is brought for argument : (see Smith's Action at Law, 100, 5th edit.) If the defendant pleads issuably to the remainder of the declaration, by such a plea the plaintiff's right to recover is fairly put in issue, and an issue of fact is raised which must in general, as before seen, be decided by a jury in the usual way : (see *supra*.) When there are issues in law and in fact, the plaintiff has the option to try either first, subject to the control of the court. In general the court will order the demurrer to be argued first, as thereby the trial may be unnecessary, and the pleading may not be allowed to be amended after verdict : (Pat. & Mac. C. L. Pract. 900.)

Q.—What is the usual mode of meeting a defective pleading ; and is it available to either party ?

A.—If a plea be pleaded which is entirely inapplicable to the action, the plaintiff may treat the plea as a nullity and sign judgment. If the defect only amounts to an irregularity, a summons may be taken out to set it aside, or it may be waived by the opposite party taking a further step with a knowledge of such irregularity ; but if it amounts to a nullity, the opposite party cannot waive it by taking a fresh proceeding. If application be made to set the pleading aside for irregularity, it must be made within a reasonable time, and no further step must have been taken with a knowledge of the irregularity : (see Arch. New C. L. Pract. 70, 453, *et seq.* 2nd edit.)

By stat. 15 & 16 Vict. c. 76, s. 52, it is provided that if any pleading be so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party may apply to the court or a judge to strike out or amend such pleading, and the court or judge may make such order

respecting the same, and also respecting the costs of the application, as such court or judge shall see fit.

Q.—If the defendant does not plead in due time, what course does the plaintiff adopt in actions of assumpsit, debt, &c. ?

A.—Where the defendant is within the jurisdiction, the time for pleading in bar is eight days, unless extended by the court or a judge; and a notice requiring the defendant to plead in eight days, otherwise judgment, may, whether the declaration be delivered or filed, be indorsed on the declaration or delivered separately: (see sect. 63 of 15 & 16 Vict. c. 76.) If the defendant makes default, the plaintiff may sign judgment.

Q.—If the defendant is under terms to plead issuably, and pleads a plea that is not issuable, what course should the plaintiff adopt ?

A.—The plaintiff may treat the plea as a nullity, and sign judgment: (see Arch. New C. L. Pract. 80, 2nd edit.)

Q.—In actions of trespass, can you have more than one count for acts committed at the same time and place ?

A.—Several counts for the same cause of action are not allowed, but a judge may allow them, subject to such terms as he may think fit, if they appear to be proper for determining the real question in controversy between the parties. If several counts are used, and no order has been made as to the costs, and the judge who tries the cause certifies that a distinct cause of action has not been established, the costs occasioned by such superfluous count will be borne by the plaintiff: (R. G. Pl. ss. 1, 2; Smith's Action at Law, 83, 5th edit. ; and see *ante*, p. 49.)

Q.—When after service of a copy of a writ of summons is the cause out of court if the plaintiff do not declare ?

A.—A plaintiff shall be deemed out of court unless he declare within one year after the writ of summons is returnable: (see sect. 58 of 15 & 16 Vict. c. 76, and *ante*, p. 48.)

Q.—State some of the most common grounds for setting aside a declaration for irregularity.

A.—For variations in the declaration and writ in the name of the defendant; or, if the declaration be for a different cause of action from that expressed in the writ; in these and the like cases the court would formerly have set aside the proceeding for irregularity: (see Arch. New C. L. Pract. 454, 2nd edit.) The 222nd section of the 15 & 16 Vict. c. 66, however, provides that it shall be lawful for the superior courts of common law and every judge thereof, and any judge sitting at Nisi Prius, at all times to amend all defects and errors in any proceedings in civil causes, and whether the defect or error be that of the party applying to amend or not; and the amendments may be made with or without costs, and upon such terms as the court or judge may deem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made.

Q.—Where a Christian name in the declaration varies from that in the summons, within what time must the objection be taken ?

A.—If the irregularity be in the declaration the application must be made within four days after declaration delivered: (Arch. New C. L. Pract. 458, 2nd edit.)

Q.—Where an executor is sued for a debt owing by his testator, and the plea is *plene administravit* only, and the plaintiff cannot disprove the plea, but there is other personal estate to be got in, what course should the plaintiff take?

A.—The plaintiff should sign judgment of *quando acciderint*, and when the assets afterwards come to the hands of the executor, proceed against him either by suggestion or by writ of revivor: (Arch. New C. L. Pract. 334, 2nd edit.) Formerly the plaintiff proceeded against the defendant by *scire facias* in such a case: (see Chitt. Arch. 878, 7th edit.)

Q.—John Wilson sues Amelia Henderson for 20*l.* due to him from Amelia for goods sold and delivered; Amelia appears and pleads coverture as an answer to the action. Can she appear and plead by attorney, or must she appear and plead in person? and, if the latter, state the reason why.

A.—She must appear and plead in person, otherwise she cannot avail herself of her coverture: (Arch. New C. L. Pract. 338, 2nd edit.)

Q.—What distinction do you draw between a plea in abatement and a plea in bar; and can the former be pleaded when the defendant is under terms to plead issuably?

A.—A plea in bar is an answer to the action (Holth. Law Dict. 2nd edit.); whilst a plea in abatement is not, but shows that the plaintiff has committed some informality and points out how he ought to have proceeded. Only four days are allowed for pleading in abatement, and such plea must be verified by affidavit: (Smith's Action at Law, 77, 5th edit.) If the defendant is under terms to plead issuably he cannot plead a plea in abatement, or if he does the plaintiff may treat it as a nullity and sign judgment: (see Arch. New C. L. Pract. 80, 2nd edit.)

Q.—When an action of contract is brought against one of several partners, what step ought the defendant to take, and what is a necessary accompaniment to such step, and the effect of the absence thereof?

A.—The only mode of objecting to the nonjoinder is by a plea in abatement, which must show that the party omitted is resident within the jurisdiction of the court, and the plea must be accompanied by an affidavit of verification, and state with convenient certainty the place of residence of the party omitted; if this plea be not accompanied by such affidavit, the plaintiff may treat it as a nullity and sign judgment: (see Arch. New C. L. Pract. 96, *et seq.* 2nd edit.)

Q.—State a few instances of what are called special pleas.

A.—The following are instances of special pleas:—infancy, coverture, release, payment, performance, illegality of consideration, set-off, mutual credit, &c.: (see Arch. New C. L. Pract. 656, 2nd edit.)

Q.—How is advantage to be taken of a cause of defence arising after action brought?

A.—By plea *puis darrien continuance*, whether it be a matter of abatement or in bar: (Arch. New C. L. Pract. 94, 2nd edit.)

Q.—Is anything necessary to be done before such plea can be allowed?

A.—No such plea shall be allowed unless accompanied by an affidavit that the matter thereon *Digitized by Google* next before the pleading

of such plea, or unless the court or a judge shall otherwise order. Also a plea *puis darrien continuance* is deemed a dilatory plea, and must be verified by affidavit in the same manner as a plea in abatement: (see Arch. New C. L. Pract. 95, 96, 2nd edit.)

*Q.*—Define a *traverse* and a plea in *confession and avoidance* and give instances of each.

*A.*—Traversing is denying some material part of the adversary's last pleading; confessing and avoiding is admitting the last pleading of the adversary to be true, but also alleging some new matter altering the legal effect of it, and showing that the party so pleading, is nevertheless entitled to judgment: (Smith's Action at Law, 83, 5th edit.) Thus, the general issue of not guilty in actions of trespass for assault and battery, denies the act of violence alleged; while, on the other hand, the plea of *son assault demesne* in the same action confesses the act, but avoids it by showing circumstances of excuse or justification. So, in an action for goods sold and delivered, the general issue of never indebted traverses the sale and delivery; while the plea of payment confesses, but avoids it by showing matter of discharge: (3 Steph. Com. 577, 578.)

*Q.*—When an order for particulars of plaintiff's demand is obtained, with a stay of proceedings in the meanwhile, pending the time allowed for pleading, what time is allowed to the defendant to plead after the delivery of the particulars?

*A.*—By Rule Gen. 21, a defendant is allowed the same time for pleading after the delivery of the particulars under a judge's order, which he had at the return of the summons, unless otherwise provided for in such order: (See Arch. New C. L. Pract. 566, 2nd edit.)

*Q.*—From what time is a declaration deemed to be filed?

*A.*—This question rather applies to the old than the new practice; formerly when notices to plead were delivered separately, the declaration was only deemed to be filed from the service of the notice. But now, as notices to plead are generally indorsed on the declaration, this will no longer be so. As to when a declaration should be filed, see *ante*, p. 49.

*Q.*—Is the signature of counsel necessary to a joinder in demurrer?

*A.*—The signature of counsel is not necessary to a joinder in demurrer: (see 15 & 16 Vict. c. 76, s. 85; Arch. New C. L. Pract. 464, 2nd edit.)

*Q.*—When, after a judge's order for further time to plead, further time is required, within what time should the summonses for further time be served and returnable, in order to prevent judgment by default?

*A.*—The summons must be served and returnable before the expiration of the time given by the first order, in order to prevent judgment by default.

*Q.*—When the plaintiff replies without joining issue, what is the defendant's next pleading called?

*A.*—A rejoinder: (Smith's Action at Law, 83, 5th edit.)

*Q.*—What is the meaning of an issuable plea?

*A.*—Pleading a plea by which the right of the plaintiff to recover is fairly put in issue: (Arch. New C. L. Pract. 68, 2nd edit.)

*Q.*—What is the effect of the plea of *non assumpsit* to a declaration

on a policy of assurance containing averments of the plaintiff's interest and of the loss ?

A.—In an action on a policy of assurance, the plea of *non assumpsit* to a declaration containing averments of the plaintiff's interest and of his loss, will operate as a denial of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, or of the loss, or of any alleged compliance with warranties: (see Pat. & Mac. C. L. Pract. 178.)

Q.—May payment be given in evidence in reduction of damages, or must it in all cases be pleaded, and why ?

A.—Payment cannot now be given in evidence, because it is declared by Rule Pl. H. T. 1853, r. 14, that "payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar." By this means the plaintiff has notice of the defence and is enabled to meet it.

Q.—What does the plea of "never indebted" put in issue ?

A.—The plea of never indebted will operate as a denial of those matters of fact from which the liability of the defendant arises; *exempli gratia*, in actions for goods bargained and sold, or sold and delivered, the plea will operate as a denial both of the bargain and sale, or sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff: (Rule Pl. T. R. 1853, r. 6; Pat. & Mac. C. L. Pract. 180, &c.)

Q.—State some of the defences of which a defendant may avail himself under the plea of the general issue, first, to a count for goods sold and delivered; secondly, to a count for goods bargained and sold.

A.—We have already stated the effect of this plea *supra*. Under such a plea to these counts you may show that the goods were sold upon credit, which had not expired at the commencement of the suit; that the goods did not accord with the sample; that they were of so bad a quality as to be useless; that the sale was a conditional one, &c.: (see Chitt. Arch. Q. B. Pract. 228, 9th edit.)

Q.—If a defendant is advised to plead more than one plea to an action, how is he to proceed ?

A.—A number of the most usual pleas may be pleaded as of right, but in other cases the leave of the court or judge must be obtained, which is done by a summons to plead several matters, and all objections to such pleas, being founded on the same ground of answer or defence, must be heard upon the summons: (Smith's Action at Law, 80, 5th edit.)

Q.—No summons or order to plead several matters is necessary in certain cases; state what the pleas are, or some of them, to which this rule applies.

A.—By the 15 & 16 Vict. c. 76, s. 84, the following pleas, or any two or more of them, may be pleaded together as of course, without leave of the court or a judge; that is to say—a plea denying any contract or debt alleged in the declaration; a plea of tender as to part; a plea of the Statute of Limitations, set-off, bankruptcy of the defendant, discharge under an insolvent act, *plene administravit*, infancy, coverture, pay-

ment, accord and satisfaction, release, not guilty, leave and licence : (see further, Arch. New C. L. Pract. 82, 2nd edit.)

**Q.**—In an action on a mortgage deed where the only plea is *non est factum*, can the defendant go into evidence that the deed was obtained by fraud, or that the consideration money was not paid ?

**A.**—No ; for this plea (general issue) operates as a denial of the execution of the deed in point of fact only, and all other defences must be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable : (see Arch. New C. L. Pract. 656, 2nd edit.)

**Q.**—When the defendant pleads the general issue, intending to give special matter in evidence by virtue of an act of Parliament, what particulars should accompany the plea ?

**A.**—By the pleading rules of 1853, sect. 21, in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence by virtue of an act of Parliament, he shall insert in the margin of the plea the words “By Statute,” together with the year or years of the reign in which the act or acts of Parliament upon which he relies for that purpose were passed, and also the chapter and section of each of such acts, and shall specify whether such acts are public or otherwise, otherwise such plea shall be taken not to have been pleaded by virtue of any act of Parliament ; and such memorandum shall be inserted in the margin of the issue, and of the  *nisi prius*  record : (Arch. New C. L. Pract. 659, 2nd edit.)

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## INTERLOCUTORY OR COLLATERAL PROCEEDINGS.

**Question.**—What is meant by interlocutory proceedings ?

**Answer.**—All proceedings which occur or intervene between the commencement of the action and its termination are strictly speaking interlocutory. But what is generally understood by interlocutory proceedings, are such as applications for time to plead, for delivery of particulars of demand, set-off, to change the venue, to set aside proceedings for irregularity, and the like.

**Q.**—Within what time must application be made to a court or judge to set aside proceedings for irregularity ? and what will preclude a person from making such application ?

**A.**—By Rule Gen. 135, no application to set aside proceedings for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity : (Arch. New C. L. Pract. 458, 2nd edit. ; Pat. & Mac. C. L. Pract. 1051.)

**Q.**—State the distinction between an irregularity in practice and a nullity.

**A.**—A proceeding is said to be irregular when taken too soon or too late, or in an improper manner. Where the mistake, however, consists not in the mere manner but in the substance of the thing done, it is not only irregular, but it is a nullity and void altogether : (see Arch. New C. L. Pract. 453, 454, 2nd edit. ; Pat. & Mac. C. L. Pract. 34.) When the proceeding is not merely irregular, but void and a nullity altogether, no act of the other party afterwards can be construed into a waiver of the irregularity, &c. : (*Id.*)

**Q.**—In what cases must leave be obtained for payment of money into court ?

**A.**—When one or more of several defendants is desirous to pay money into court, leave must be obtained : (15 & 16 Vict. c. 76, ss. 70, 72.) But the defendant cannot pay money into court, either with or without leave, in actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant : (sect. 70.) And nothing contained in the act is to affect the provisions of the stat. 6 & 7 Vict. c. 96, intituled "An Act to amend the Law respecting Defamatory Words and Libel :—" (*Id.* ; and see Arch. C. L. Pract. 90, 2nd edit.)

**Q.**—What are the requisites to constitute a valid tender ?

**A.**—In the absence of directions from the creditor, there must, to constitute a legal tender of the debt, be an actual production and offer of the sum due, unless the creditor dispense with it by a declaration that he will not accept it ; and this tender must be of *money* ; if beyond forty shillings, in gold, or in what has been rendered by act of Parliament equivalent to money for that purpose, viz., notes of the Bank of England, which are a legal tender for any sum exceeding *five pounds*, except at the Bank itself and its branches. But a tender of country bank notes, although not strictly a legal tender, yet, if not objected to on that account, will be sufficient. The tender of a larger sum to pay a smaller, requiring change is not a valid tender ; nor is a tender good if accompanied by any condition : (see Smith's Merc. Law, 510, 5th edit. ; Arch. New C. L. Pract. 87, 2nd edit.)

**Q.**—If a tender has been made and refused before action, what steps should be taken to prevent the party availing himself of it by plea, in any action to be afterwards commenced ?

**A.**—The plaintiff cannot prevent the defendant availing himself of the tender by pleading it in an action afterwards commenced, unless he can prove a prior or subsequent demand and refusal : (see Smith's Merc. Law, 522, 5th edit. ; Arch. New C. L. Pract. 88, 2nd edit.)

**Q.**—If a defendant has tendered previous to the action, what he considers sufficient to cover the demand against him, what is the mode of proceeding, and will the plaintiff have to receive or pay the costs of the action in case he does not recover more than the amount tendered ?

**A.**—The defendant must pay the money into court, and plead tender ; if the plaintiff on the trial recovers nothing beyond the sum tendered, he will not be entitled to any costs, but will have to pay the defendant's costs : (Tidd's Pract. 622, 971, 9th edit. ; Gray on Costs, 306.)

**Q.**—What is the meaning of suing in *formâ pauperis*, and what is requisite in order to be allowed to do so ?

**A.**—The meaning of suing in *formâ pauperis*, is suing in the form of



a *pauper*. In order to be allowed to do so, the person must obtain a barrister's certificate (on a case being laid before him), that he has a good cause of action; and he must make an affidavit that the case contained a true statement of all the material facts, and that he is not worth five pounds, except his wearing apparel and the matter in question: (see Arch. New C. L. Pract. 353, 2nd edit.; Gray on Costs, 257; and see hereon *ex parte Cobbett*, 30 L. T. Rep. 322.)

Q.—After delay of proceedings for a year, what notice must now be given by a party who desires to proceed?

A.—In such a case a calendar month's notice must now be given by the party desiring to proceed, whether plaintiff or defendant: (Rule 176, H. T. 1853.)

Q.—If a plaintiff does not proceed in his action in due course after plea, can defendant compel him to proceed, and how?

A.—Yes; the defendant may give notice to the plaintiff to reply, &c., within four days, otherwise judgment; which notice may be delivered separately or indorsed on the plea, &c., at the time of its delivery. And if the plaintiff do not reply, &c., within the proper time, the defendant may sign judgment of *non pros.*: (see Arch. New C. L. Pract. 100, 2nd edit.)

Q.—When is a cause at issue, and can there be more than one issue in a cause?

A.—A cause is said to be at issue when the plaintiff and defendant have arrived at some specific point or matter, affirmed on the one side and denied on the other: (Holth. Law Dict., 2nd edit.; Smith's Action at Law, 85, 5th edit.) There may be more issues than one, and there may be issues both of fact and law: (Smith's Action at Law, 92, 5th edit.)

Q.—Can the judges amend defects in record after judgment given?

A.—The court will allow the record to be amended after judgment, or even after error brought and errors assigned: (see Arch. New C. L. Pract. 514, 2nd edit.)

Q.—When personal service of a rule is not required, will putting it under the door of the defendant's chambers, or place of business, or into the letter box be sufficient, or what is further required to make it good; and where a rule *nisi* is improperly served, can it ever be made absolute?

A.—If personal service of the rule is not requisite, putting it under the door of the defendant's chambers, &c., will not be sufficient unless you afterwards call and ascertain that it has been received. If there is any irregularity in the service of a rule *nisi*, the party's appearing and showing cause against it will, in general, be a waiver of the irregularity: (see Arch. New C. L. Pract. 618, 620, 2nd edit.)

Q.—If a defendant quits, and altogether gives up his place of residence, after service of a copy of the writ of summons, but before the plaintiff has declared, how do you proceed in your action?

A.—It is presumed, from the manner in which the question is put, that the defendant has appeared. If he has appeared by attorney, the declaration must be delivered to the attorney, or to the defendant himself, or left for him at the address mentioned in the memorandum of appearance, if he have appeared in person. And if there is a notice to plead in eight

days, otherwise judgment, either indorsed on the declaration, or written on a separate paper, and served upon the defendant's attorney, or the defendant himself, or left at his address mentioned in the memorandum of appearance, if he appears in person, and he make default, the plaintiff may sign judgment for want of a plea: (see Arch. New C. L. Pract. 69, 70, 2nd edit.) If the defendant has not appeared, you must file the declaration and notice in the Master's office, and sign judgment for default of a plea: (Pat. & Mac. C. L. Pr. 125.)

**Q.**—When the declaration does not disclose the particulars of the plaintiff's demand, in actions of assumpsit or debt, &c., how are they to be obtained, and can they be obtained before appearance?

**A.**—In cases where particulars of demand should be delivered, and they are not, they may be obtained by summons before a judge at chambers, which may be had before appearance, and, if the judge thinks fit, without an affidavit: (see Smith's Action at Law, 93, 5th edit.)

**Q.**—How is time computed upon the rules of practice in the course of a cause; if a party has four days to do any given act from the first of the month, when does the time expire?

**A.**—By Rule Gen. 174, it is ordered that "in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the court, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also. This, however, is only applicable when prescribed by the rules or practice of the court; when it is prescribed by either of the Procedure Acts, this rule does not apply: (see Arch. New C. L. Pract. 10, 2nd edit.) Therefore, by the above rule, if a person has four days to do any given act from the first of the month, the time does not expire until the fifth, and this gives him the whole of the fifth to do the act.

**Q.**—What are the issuable, and what are the non-issuable, terms?

**A.**—The issuable terms are Hilary and Trinity; the non-issuable are Easter and Michaelmas.

**Q.**—In what cases is a term's notice required?

**A.**—After delay of proceedings for a year, a term's notice must formerly have been given by a party desiring to proceed; but now, by Rule Gen. 176, only a calendar month's notice is necessary in such a case: (see Arch. New C. L. Pract. 11, 2nd edit.; *ante*, p. 51, 57.)

**Q.**—Before what hour must service of pleadings, notices, summonses, orders, rules, and other proceedings be made, to prevent the service being deemed as made on the following day?

**A.**—The service must be made before seven o'clock, p.m.; except on Saturdays, when it shall be made before two o'clock, p.m. If made after seven o'clock, p.m., on any day except Saturday, the service shall be deemed as made on the following day; and, if made after two o'clock p.m. on Saturday, the service shall be deemed as made on the following Monday.

**Q.**—When a summons is applied for to set aside proceedings for irregularity, what must be stated therein?

*A.*—The several objections intended to be insisted upon must be stated in the summons : (Rule Gen. 136.)

*Q.*—If separate actions are brought against the acceptor, drawer, and endorser of a bill of exchange, and the acceptor takes out a summons to stay the proceedings, what particular terms are imposed upon him ?

*A.*—The terms imposed upon the acceptor are, that he pay the amount of the bill, and the costs of that action. Formerly, in actions against the acceptor of a bill, the court, in addition to this, required him to pay the costs in all the other actions which might have been brought by the same plaintiff against other parties to the bill, before they would have stayed the proceedings, he being the original defaulter : (see Arch. New C. L. Pract. 588, 2nd edit. ; and see Byles on Bills, 318, 4th edit.)

*Q.*—Where several actions are brought against different underwriters on the same policy, can they take any, and what, steps to save unnecessary expense ?

*A.*—Yes ; the actions may be consolidated. Application should be made by the defendants to a judge at chambers, who will stay the proceedings in all the actions but one, they undertaking to abide by the verdict in that one. But if the actions be brought on different policies, though on the same ship, &c., the court will not order a consolidation of them, without the consent of the plaintiff : (see further Arch. New C. L. Pract. 548, 2nd edit.)

*Q.*—When a defendant, in an action of contract, suffers judgment to go by default, how should the plaintiff proceed to ascertain the amount due to him ?

*A.*—He must do so by writ of inquiry, or, where it shall appear to the court or a judge that the amount of damages sought to be recovered by the plaintiff is substantially a matter of calculation, it shall not be necessary to issue a writ of inquiry ; but the court or judge may direct that the amount for which final judgment is to be signed shall be ascertained by one of the Masters of the court ; and the attendance of witnesses and production of documents before such Master may be compelled by subpoena, in the same manner as before a jury on a writ of inquiry : (see Arch. New C. L. Pract. 71, 72, 2nd edit.)

*Q.*—Where a defendant, in an action brought against him as acceptor of a bill of exchange or drawer of a promissory note, suffers judgment to go by default, how should the plaintiff proceed to ascertain the amount due to him ?

*A.*—If the action brought is an action of *debt*, the judgment by default will be final in the first instance : (Arch. New C. L. Pract. 71, 2nd edit.) But debt is of a limited application, and will only lie where there is a privity of contract between the parties : (3 Steph. Com. 529, 3rd edit.) In other cases, if the defendant lets judgment go by default when sued as acceptor of a bill of exchange, &c., the plaintiff must proceed to assess the amount before a Master of the court.

*Q.*—Is a judgment on a money bond interlocutory or final ?

*A.*—If the bond be conditioned for the payment of any gross sum of money, judgment on it will be final. But if it be conditioned for payment of money by instalments, the judgment will be interlocutory : (Arch. New C. L. Pract. 185, 186, 2nd edit.)

*Q.*—If a party, after being served with a judge's order, neglect to obey it, what steps should be taken ?

A.—The order should be made a rule of court. This is done by motion ; and, in ordinary cases, a motion of course, and absolute in the first instance. It is then enforced by attachment : (see Arch. New C. L. Pract. 633, 634, 2nd edit.)

Q.—Describe the different modes by which causes are removed from the inferior courts.

A.—Causes from inferior courts of record are removed by *certiorari* : (Arch. New C. L. Pract. 570, 2nd edit.) ; and from inferior courts, *not* of record, causes may generally be removed by writs of *pone*, *recordari*, *facias loquelam*, or *accedas ad curiam*, according to circumstances : (see as to these writs, Holth. Law Dict., 2nd edit.) As to the removal of replevin from the County Court, see *post*, tit. "Replevin."

Q.—What is the effect of the death of a sole plaintiff or defendant before trial ?

A.—The death of either party does not now abate the action, but, provided the cause of action survive, it may be continued by or against the personal representatives of the plaintiff or defendant. In either case a suggestion of the death and of the title or liability of the parties substituted, must be made. [The truth of the suggestion, where it substitutes a new plaintiff, will be tried at the trial, together with the title of the deceased plaintiff, and the same judgment will follow upon the verdict as if such person had originally been the plaintiff. Where a new defendant is substituted, he will be served with a copy of the writ and the suggestion, and will have an opportunity of denying and pleading to the suggestion, the mode varying according to the period of the action at which the death takes place : (see Pat. & Mac. C. L. Pr. 1055, 1056 ; Smith's Action at Law, 181.)

Q.—State the effect of the bankruptcy of either plaintiff or defendant upon a suit.

A.—By the 15 & 16 Vict. c. 76, s. 142, the bankruptcy of the plaintiff in any action which the assignees might maintain for the benefit of the creditors, shall not be pleaded in bar to such action, unless the assignees shall decline to continue and give security for the costs thereof, upon a judge's order to be obtained for that purpose, within such time as a judge may order, but the proceedings may be stayed until such election<sup>e</sup> be made ; and if the assignees neglect or refuse to continue the action, and give such security within the time limited by the order, the defendant may, within eight days after such neglect or refusal, plead the bankruptcy. On the other hand, where the defendant becomes bankrupt, if the plaintiff do not elect to abandon the action, and prove under the fiat, the defendant, if certificated, may plead his bankruptcy generally, or may plead his bankruptcy and certificate *puis darien continuance* ; but if he be not certificated, the plaintiff may, of course, continue his action to judgment and execution, as in ordinary cases : (Arch. New C. L. Pract. 321, 2nd edit.)

## EVIDENCE AND WITNESSES.

*Question.*—Into what divisions is evidence usually classed; and are there any degrees of secondary evidence?

*Answer.*—Evidence is usually divided into *primary* and *secondary*; primary being the best or highest evidence which the law deems possible for the purpose of demonstrating truth: and secondary evidence being all that kind of proof which falls short of the best evidence, and can only be adduced where it is impossible that the other can be obtained: (Taylor on Evidence, 288, 303; Powell on Evidence, 36, *et seq.*)

There are no degrees of secondary evidence: (Taylor on Evidence, 354; 3 Steph. Com. 615, 3rd edit.)

*Q.*—Has any alteration been made lately by the Legislature with regard to evidence, and as to the competency of interested parties as witnesses?

*A.*—Yes; by the 6 & 7 Vict. c. 85, s. 1, it is provided that no person offered as a witness shall hereafter be excluded by incapacity, from crime or interest, from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, or person having, by law or by consent of parties, authority to hear, receive, and examine evidence; but such person shall be admitted to give evidence on oath, or solemn affirmation, wherein affirmation is by law receivable, notwithstanding he may have an interest in the matter in question, or in the event of the trial of any issue, &c., in which he is offered as a witness, and notwithstanding the witness offered may have previously been convicted of any crime or offence.

*Q.*—What alteration in the law of evidence has been made by recent statutes?

*A.*—Besides the above act, the stat. 14 & 15 Vict. c. 99, enacts that the parties to any action, suit, or other proceeding in any court of justice, &c., shall be competent and compellable to give evidence either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, &c. By sects. 3 & 4, however, no person is compellable to answer questions tending to criminate himself, or to give evidence where the suit is instituted in consequence of adultery, or for breach of promise of marriage: (Powell on Evidence, 16.) And by the 16 & 17 Vict. c. 83, husbands and wives are rendered competent and compellable, in all civil cases, to give evidence on behalf of either or any of the parties to the said suit, &c.; but this section does not extend to criminal cases, nor to cases of adultery (sect. 2) (a) and neither husband nor wife is competent or compellable to disclose any communication made to him or her by the other during marriage: (Powell on Evidence, 33; Arch. New C. L. Pract. 671, 2nd edit.) By the 17 & 18 Vict. c. 125, a party may, to a certain extent, discredit his

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(a) By the 20 & 21 Vict. c. 85, s. 43, the court has the power to call a petitioner for judicial separation or dissolution of marriage and examine him or her; but he or she is not bound to answer questions tending to show that he or she has committed adultery.

own witnesses, &c. An attesting witness, to a document not requiring attestation to its validity, need not be called; unstamped documents may be received on depositing the amount of the stamp, penalty, and an additional penalty of one pound.

**Q.**—What is the distinction between the admissibility and the credibility of a witness?

**A.**—It is not necessary that a witness be a Christian, or even believe in the Old Testament, in order to be *admitted* as a witness; it is sufficient if he believe in a God, in a future state of rewards and punishments, and in the moral obligation of the oath he is about to take. But a man wholly without religion, and having no belief in the moral obligation of an oath, shall not be received to give evidence: (Arch. N. P. 25, &c.; Powell on Evidence, 15, *et seq.*) So a witness may be objected to who has not the use of reason: (Powell, *ubi sup.*) But by the 6 & 7 Vict. c. 85, no person is to be excluded from giving evidence before any judge or person having authority to receive evidence, because such person may be interested in the matter in question, or in the event of the suit, or because he has been previously convicted of any crime or offence: (Powell, *ubi sup.*) But, of course, the person receiving such evidence will give it the credence it deserves.

**Q.**—State the usual evidence to recover a debt for goods, when the general issue only is pleaded.

**A.**—The usual evidence required in such a case is proof of the sale and delivery of the goods, and also the value or fairness of the price charged and sought to be recovered: (1 Arch. N. P. 230 to 233.)

**Q.**—In an action on a bill of exchange, drawer against acceptor, and the defendant pleads payment only, has the plaintiff anything, and what, to prove?

**A.**—The plaintiff will have to rebut the defendant's plea of payment; but there will not be any necessity for proving the acceptance, as the plea admits it.

**Q.**—State the evidence necessary to support an action brought by a plaintiff who sues as indorsee against the drawer of a bill of exchange, when everything is put in issue and required to be proved by the defendant's pleas.

**A.**—It will be necessary to prove the drawing of the bill, the indorsements, a due presentment for payment to the acceptor, and his default; and lastly, notice of the dishonour: (see 2 Arch. N. P. 88, *et seq.*)

**Q.**—State the evidence to be adduced on the trial of an action of trover.

**A.**—In order to maintain an action of trover, the plaintiff must prove either that he was in possession of the goods in question or had the right of property, and the right to immediate possession; that the goods came into the possession of the defendant; that he, or some person by his orders or directions, coverted them; and, lastly, the value of the goods: (1 Arch. N. P. 601, *et seq.*)

**Q.**—What is the necessary evidence to support an action on an attorney's bill, when the pleas are "never indebted," and "no signed bill delivered?"

**A.**—There must be evidence given of a retainer by the defendant of the plaintiff, and that the work and business charged for is performed. The plaintiff must also prove the delivery of the bill to the defendant,

or that it was left for him at his dwelling-house, or last place of abode, one month before the action was commenced, and subscribed with the proper hand of the plaintiff. If the bill has not been taxed, the defendant will not, at the trial, be allowed to question the fairness of the charges, as he might have had that done out of court, although it is usual to be prepared with evidence of the reasonableness of the charges : (see 1 Saund. Plea. and Ev. by Lush, 248, *et seq.*, 2nd edit.; Taylor on Evidence, 208, 209; see also Arch. New C. L. Pract. 701, 2nd edit.)

**Q.**—May an answer in Chancery be used in evidence at Nisi Prius against the party making it ?

**A.**—Yes; an answer in Chancery is receivable against the party by whom it is sworn, as a cogent admission of the allegation which it contains (Ros. Ev. 105; Taylor on Evidence, 479, 1152; Powell on Evidence, 250, 251; *Gaode v. Job*, 32 L. T. Rep. 88); but *demurrers* and *pleas* in equity are not so receivable, they being merely hypothetical statements, which, *assuming* the facts as alleged, deny that the defendant is bound to answer : (Taylor on Evidence, 1152.)

**Q.**—Assuming it to be necessary, in an action brought, to give in evidence letters patent under the great seal, and the probate of a will, in what mode is the proof to be established ?

**A.**—The most convenient mode of proving letters patent, will be by producing the original under the great seal (Taylor on Evidence, 1018); but they may also be proved by printed or manuscript copies, or by extracts, certified and sealed by the commissioners of patents, or other proper officer : (16 & 17 Vict. c. 115, s. 4; Powell on Evidence, 280.) The probate of a will may be proved primarily, either by producing the probate itself, when due notice will be taken of the seal, or by producing from Doctors' Commons the Act-book, containing an entry that the will was proved and probate granted. In the event of the probate being lost or destroyed, it seems that it *may* be proved by an examined copy; or a certified copy of the entry in the Act-book, under 14 & 15 Vict. c. 99, s. 14, is sufficient; but the practice of the Probate Court in such case is to grant an exemplification of the entry in the Act-book, in which the grant of probate is recorded : (Taylor on Evidence, 1049; Powell on Evidence, 273.)

**Q.**—In what cases may entries in the writing of a deceased person be given in evidence to prove the facts stated in them ?

**A.**—If a person has peculiar means of knowing a fact, and makes an entry or declaration of that fact, which is against his interest, it is clearly evidence after his death, if he could have been examined to it in his lifetime. *Higham v. Ridgway*, 2 Smith's L. C. 183, is the leading case on this point. In this case, to prove the time of a birth, evidence was given that the surgeon who attended the birth was dead; and the books of the latter were offered in evidence. They contained an entry in the handwriting of the deceased of the circumstances of the birth, and the date; and opposite the charge for attendance was marked the word "paid." The books were allowed to be given in evidence, the entry being to the surgeon's prejudice : (Powell on Ev. 112.)

**Q.**—Can parol evidence in any and what cases be admitted in contradiction or explanation of a written contract ?

**A.**—It is a rule of law that *parol testimony cannot be received to contradict, vary, add to, or subtract from the terms of a valid written instru-*

*ment.* And the term "written instrument," as used in the rule, includes a contract. Such evidence is not admissible; first, because the parties to the instrument must be presumed to have committed to writing all which they deemed necessary to give full expression to their meaning; and, secondly, because of the mischiefs which would result, if verbal testimony were in such cases received. And it would, in most cases, be in direct opposition to the Statute of Frauds. But a written contract may be discharged *in toto* by parol evidence, and the contract altogether abandoned. But although parol evidence is not receivable to contradict, vary, add to, or subtract from a valid written instrument, yet parol evidence may, in all cases of doubt, be received to *explain* a written instrument, or, in other words, to enable the court to discover the meaning of the terms employed, and to apply them to the facts. The *doubt* here adverted to may arise from one or both of the two following causes; either the *language* of the instrument may be *susceptible of two or more meanings*, or the *persons and things* mentioned therein may require to be identified. The rule, therefore, clearly embraces two descriptions of evidence; in illustration of the latter, the following example may be given:—If an estate be conveyed by the designation of Blackacre, parol evidence may be admitted to show what property is known by that name: (see Taylor on Evidence, 745, *et seq.*; Powell on Evidence, pt. 11, chaps. vii. viii.; Sug. Vend. & Pur. Con. View. 104, 108, 111.)

Q.—Plaintiff brings an action to enforce payment from defendant of 100*l.* and interest, which defendant, by indenture between plaintiff of the one part and defendant of the other part, covenanted to pay, and which is overdue. Defendant pleads that the indenture is not his deed. What evidence must the plaintiff give at the trial to entitle him to a verdict?

A.—This plea (the general issue) operates as a denial of the execution of the deed in point of fact only; and the plaintiff will only have to give such evidence as proves the execution: (Arch. New C. L. Pract. 656, 2nd edit.)

Q.—What does the plea of not guilty deny in actions of tort?

A.—In actions for torts the plea of not guilty operates as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea; all other plea in denial shall take issue on some particular matter of fact alleged in the declaration: (see Rule Pl. H. T. 1853; Pat. & Mac. C. L. Pract. 181.)

Q.—What are the requisites of proof in actions on contracts under seal?

A.—Proof of the execution of the deed and breach of the covenant by the defendant, and the damage sustained: (see 1 Arch. N. P. 365, *et seq.*)

Q.—Has a copyhold tenant of a manor a right to unqualified inspection of the court rolls and books of the manor; and, if so, before or pending action?

A.—A copyhold tenant of a manor has a right to an unqualified inspection of the court rolls and books of the manor. And he is entitled to such inspection, although no action be pending: (see Arch. New C. L. Pract. 554, 2nd edit.)



**Q.**—On a plea of *nul tiel* record, how is a record in the same court to be proved; and how is a record of another court to be proved?

**A.**—If it be a record of the same court, the record itself must be produced. If it be a record of an inferior court, a transcript of it must be produced; and for that purpose a writ of *certiorari* must issue, directed to the judge of the inferior court, and tested and returnable in term, commanding him to send a transcript of the record to the court in which the action is pending. But if it be a record of a superior court, then, inasmuch as an inferior court cannot command a superior one, nor courts of equal degree one another, the record must first be brought into Chancery by writ of *certiorari* sued out of the Petty Bag office, and returnable in Chancery; and afterwards an exemplification of it, under the Lord Chancellor's seal, is sent by *mittimus* (also sued out of the Petty Bag office) to the court in which the action is pending: (see Arch. New C. L. Pract. 89, 2nd edit.; Smith's Action at Law, 106, 5th edit.; Chit. Arch. 873, &c., 9th edit.)

**Q.**—If a deed or document, required for the purposes of the cause, is in the possession of the adverse party, what is the usual course to be pursued with a view to its production; or, if not produced, to be enabled to give secondary evidence of its contents?

**A.**—If you wish to prove a document in the possession of the opposite party, or of his agent or deputy, or his banker, you may give him or his attorney notice to produce it; and if when called upon at the trial he refuses to do so, then, upon proof of the notice and that the document is in the possession of the party, or his agent, &c., you may give secondary evidence of its contents: (see Arch. New C. L. Pract. 116, 2nd edit.; Chit. Arch. 293, &c., 9th edit.)

**Q.**—If you are in possession of a document which you intend to produce at the trial, would you be justified in incurring the expense of taking a witness to prove it; or is there any other way of avoiding the expense, and what is the consequence of not adopting it? (a)

**A.**—You should, in such case, give the opposite party notice to admit the document. And unless the notice be given, no costs of proving such document will be allowed, except in cases where the omission to give such notice is, in the opinion of the Master, a saving of expense: (see 15 & 16 Vict. c. 76, s. 117; Arch. New C. L. Pract. 114, 2nd edit.; Chit. Arch. 289, 9th edit.)

**Q.**—In what cases is secondary evidence of documents admissible?

**A.**—When a party has done everything in his power to bring before the court primary evidence of his case, as by searching for documents in places where it was most reasonable to expect them to be deposited, or by giving an opposite party notice to produce them, he will then, and not till then, if he be unsuccessful in his exertions, be permitted by the court to give secondary evidence of such documents: (Powell on Evidence, 302; see also Pat. & Mac. C. L. Pract. 303.)

**Q.**—Does the rule of court, which requires a *notice to admit* written documents proposed to be adduced in evidence, apply to all documents, or to such only as are in the party's possession?

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(a) This and the next preceding question have been asked in the following form:—**Q.**—What communication upon his documentary evidence should an attorney have with the opposite party before going to trial, and what is the consequence of omitting to take the proper steps?

*A.*—Yes ; it extends as well to documents in the hands of third parties, as to those in possession of the party requiring the admission ; but the documents must be described accordingly : (Arch. New C. L. Pract. *supra* ; Chit. Arch. *supra*.)

*Q.*—When verdict has been set aside and a new trial directed, and, previously to the first trial, the usual notice to inspect and admit documents given, and admission made ; is it necessary to give fresh notice and to obtain a fresh admission of the same documents upon the second trial ?

*A.*—It is not ; but the notice given and the admission made on the first trial will be binding on the parties : (Pat. & Mac. C. L. Pract. 227 ; Chit. Arch. 292, 9th edit.)

*Q.*—In what case is it necessary to call an *attesting* witness in order to prove a document ? What alteration has been recently made in the law on this subject ?

*A.*—It was a common law principle that, where a private writing was subscribed by one or more attesting witnesses, one of such witnesses must be called to prove the execution of the instrument ; and it was not competent to prove it even by the admission of the party executing it. But by the 17 & 18 Vict. c. 125, s. 26, instruments, to the validity of which attestation is not necessary, may now be proved by admission or otherwise ; therefore, it is only necessary to call the attesting witness where attestation is necessary to give the instrument validity, as in the case of wills, warrants of attorney, cognovits, &c. : (see Powell on Evidence, 306, 307.)

*Q.*—Will a deed ever, and when, prove itself without calling the attesting witnesses ?

*A.*—Where a deed or other writing is thirty years old it proves itself. And now, by the 17 & 18 Vict. c. 125, s. 26, deeds and other instruments, to the validity of which attestation is not necessary, need not be proved by the attesting witness, if there be one ; but they may be proved by admission, or otherwise, as if there had been no attesting witness thereto : (see Arch. New C. L. Pract. 667, 2nd edit.)

*Q.*—When an attesting witness to the execution of a deed is dead, what proof is required of the execution of the deed ?

*A.*—As already seen, deeds, to the validity of which attestation is not necessary, need not be proved by the attesting witness. But where attestation is necessary to the validity of the instrument, as in the case of a will, or execution of a power, the usual evidence of the attesting witness will be requisite ; and, if he be dead, proof must be given of his handwriting and death : (see Powell on Evidence, 306, 307 ; Arch. New C. L. Pract. 667, 2nd edit.)

*Q.*—Suppose a witness whom you wished to call as a witness in a cause was about to sail on a distant voyage, should you think it advisable to detain him here till the trial, or is there any other way of obtaining his testimony ?

*A.*—Yes ; application may be made to the court, or a judge thereof, for a rule or order for the examination of the witness on oath upon interrogatories, or otherwise, before the Master or prothonotary of the said court, or other person or persons so named in such order. The application for the rule or order should be supported by affidavit, statig

the name of the witness, and that he is material, and the grounds upon which you apply to have him examined upon interrogatories. The interrogatories (if examination so taken) and cross interrogatories should, when prepared, be annexed to the rule or order and delivered to the persons who are to take the examinations. Copies should also be served on the opposite attorneys respectively : (Arch. New C. L. Pract. 123, *et seq.*, 2nd edit. ; Chit. Arch. 299, 9th edit.)

Q.—Where a cause is at issue, and a material witness is so ill as to be unable to attend the trial, and there is danger of the evidence being lost, is any, and what, course open to the party requiring the evidence of the witness by which he can obtain the benefit of such evidence ?

A.—Yes ; a similar rule or order to that stated in the preceding answer may be obtained, and in a like manner. But there must, in addition to the usual affidavit, also be an affidavit of a surgeon or physician verifying the illness of the witness. But in neither of the above cases can the depositions taken be read as evidence at any trial, without the consent of the parties against whom the same may be offered, unless the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable, from permanent sickness or other permanent infirmity to attend the trial : (see 1 Will. 4, c. 20, s. 10 ; Arch. New C. L. Pract. *supra* ; Chit. Arch. *supra*.)

Q.—An action is brought on a charter-party, the defendant's witnesses reside at Singapore ; how can he procure their testimony ?

A.—The testimony of the witness may be procured by applying to any of the superior courts for a writ in the nature of a *mandamus*, or commission for the examination of the witness there, and, upon the examination being returned, it shall be allowed and read as evidence at the trial : (see 13 Geo. 3, c. 63, s. 44 ; 1 Will. 4, c. 22, s. 1.) The opposite party may have a copy of the deposition upon paying for it : (see Arch. New C. L. Pract. 122, 2nd edit. ; Chit. Arch. *supra*.)

Q.—A. brings an action on a policy of insurance ; his principal witnesses reside at Bordeaux and Dublin, and refuse to come over to be examined ; can the plaintiff enforce their attendance, or how can he obtain their testimony ?

A.—The plaintiff cannot compel witnesses residing at Bordeaux to come over to this country to be examined, but he may have a commission for their examination there, on oath, by interrogatories, or otherwise : (see Arch. *supra*.) The witnesses residing in Dublin may by leave of the court, or a judge where the court is not sitting, be compelled, by subpœna, to attend in this country for the purpose of obtaining their testimony : (see 17 & 18 Vict. c. 34 ; Powell on Evidence, 370.) Under this act, if the court is sitting, application must be made to the court, and not to a judge at chambers. It is a rule absolute in the first instance : (*Smith v. McGuire*, 31 L. T. Rep. 119.)

Q.—If a witness do not attend upon this subpœna, can he be proceeded against ; and, if so, in what way ?

A.—The usual remedy against a witness for nonattendance at the trial is by attachment. To entitle a party to this remedy, the witness must have been personally served with a copy of the subpœna, and the original at the same time shown to him ; his necessary expenses must also be paid or tendered to him, and the affidavit must state he was a material witness. Or by 5 Eliz. c. 9, s. 12, the party may maintain an action against a witness who fails to attend at the trial, after being

served with a subpœna : (see Arch. New C. L. Pract. 121, 2nd edit. ; Chit. Arch. 325, 9th edit.)

*Q.*—An attorney preparing a brief calls on a witness to subpœna him, but, not finding him at home, leaves a copy of the subpœna for him with his wife. Is this sufficient ?

*A.*—No. See preceding answer.

*Q.*—How many witnesses can be included in a common subpœna ?

*A.*—Four : (Chit. Arch. 319, 9th edit.)

*Q.*—If a witness have in his custody or possession any deed or writings, what is the usual mode of requiring him to produce them ?

*A.*—By serving him with a *subpœna duces tecum*, which, after requiring him to appear as in a common subpœna, adds, “*and also that you bring with you, and produce at the time and place aforesaid, a certain,*” &c., describing the instrument : (see Arch. New C. L. Pract. 120, 2nd edit.)

*Q.*—How are you to enforce the attendance of witnesses before arbitrators, or on commissions ?

*A.*—Where the submission is by rule of court, or judge’s order, or order of Nisi Prius, or where it contains no stipulation that it shall not be made a rule of court (see 17 & 18 Vict. c. 125), the attendance of witnesses before the arbitrator may be compelled either by rule of court or judge’s order ; the party at the time of making the application stating the county in which the witness resides, or that he cannot be found : (Taylor on Evidence, 844 ; Arch. New C. L. Pract. 412, 2nd edit. ; Powell on Evidence, 264.)

The attendance of witnesses on a commission is also enforced by rule or order, the wilfully disobeying which is a contempt of court, and punishable by attachment, the order first being made a rule of court ; if, in addition to the service of the rule or order, an appointment of the time and place of attendance in obedience thereto, signed by the persons or person appointed to take the examination, or one of them, shall be also served, together with or after the rule or order : (see Taylor on Evidence, 845, 846.) See 6 & 7 Vict. c. 82, ss. 5, 6, as to the mode of compelling the attendance of witnesses when the commission is to be executed out of the jurisdiction.

*Q.*—A plaintiff or defendant, prior to the trial of a cause, wishes to ascertain facts which he believes to be in the knowledge of the opposite party ; what proceedings should he adopt to do so ?

*A.*—He should interrogate the party ; for now by the 17 & 18 Vict. c. 125, ss. 51 to 57, either party in a cause may, leave being first obtained, deliver to the opposing party, if he would be liable to be examined as a witness, or to his attorney, written interrogatories on any matter on which discovery is sought, and require such party, within ten days, to answer the questions in writing, by affidavit ; and the omission to answer sufficiently, without just cause, is punishable as a contempt of court.

The court or a judge may, in case of such omission, also order an oral examination of the interrogated party, as to any particular points before a judge or master, and compel the production of documents for the better elucidation of truth : (see Smith’s Action at Law, 118, 119, 5th edit.)

*Q.*—In an action of libel (as, for instance, a libel published in a

newspaper), state generally what are the leading points that require to be proved.

A.—The plaintiff will have to prove the publication of the libel, the malice of the defendant, and, if special damage has been sustained, the amount of such damage : (see Arch. N. P. 442, *et seq.*)

Q.—In actions of libel or slander, what is the meaning of the communication being privileged? Give some instances of privileged communications.

A.—The meaning of the communication being privileged in libel and slander is, that it cannot be received as evidence of the libel or slander ; it rebuts the *primâ facie* inference of malice. A communication is privileged if made by a party *bonâ fide* in compliance with a request made by a party who has an interest in the matter, or if in discharge of a legal or moral duty : (*Owens v. Roberts*, 29 L. T. Rep. 39.) In fact, the rule of law is, that if a person who has an interest or duty in reference to the subject-matter of the libel publishes a statement to a person who has a duty in reference to the same subject-matter, or publishes to a person who he believes has a moral duty, that communication is privileged, and the occasion rebuts the inference of malice : (*Harrison v. Bush*, 5 Ell. & Bl. ; see also *Buckley v. Kiesman*, 30 L. T. Rep. 203 ; *Atkinson v. Congreve*, 30 L. T. Rep. 13.)

## TRIAL, AND ITS INCIDENTAL PROCEEDINGS.

Question.—How many days are necessary for a notice of trial, whether in a town or a country cause ?

Answer.—By the 97th section of the 15 & 16 Vict. c. 76, ten days' notice of trial shall be given, and shall be sufficient in all cases, whether at bar or at Nisi Prius, in town or country, unless otherwise ordered by the court or a judge.

Q.—When a defendant is under terms of "pleading issuably, rejoining gratis, and taking short notice of trial," what is understood by those terms respectively ?

A.—By pleading issuably is meant a plea by which the right of the plaintiff to recover may be fairly put in issue ; by rejoining gratis is meant rejoining without notice ; and short notice of trial, in all cases, means four days : (see Arch. New C. L. Pract. 78, 80, 110, 2nd edit. ; *Smith's Action at Law*, 90, 110, 5th edit.)

Q.—Where a defendant is under terms to take short notice of trial for any particular sittings, is the plaintiff at liberty to give short notice of trial for any subsequent sittings ?

A.—No ; the plaintiff is not at liberty to give short notice of trial for any subsequent sittings, after the sittings for which the defendant was under terms : (see Arch. New C. L. Pract. 111, 2nd edit.)

Q.—What number of days is a sufficient countermand of full notice of trial ?

**A.**—Four days before the time mentioned in the notice of trial is sufficient: (15 & 16 Vict. c. 76, s. 98; Chit. Arch. 286, 9th edit.)

**Q.**—If a cause be made a remanet, is a new notice of trial necessary either in a town or a country cause?

**A.**—If the record be made a remanet at the assizes, the plaintiff cannot afterwards proceed to trial without giving a new notice of trial; but if made a remanet from one sitting to another, in London or Middlesex, a new notice is not necessary: (see Arch. New C. L. Pract. 110, 2nd edit.)

**Q.**—What cases can a judge of one of the superior courts direct to be tried before the sheriff?

**A.**—In cases where the debt or demand sued for *and* indorsed on the writ does not exceed twenty pounds, and the issue does not involve any difficult question of fact or law; and for which purpose a writ is issued, called a writ of trial: (see Arch. New C. L. Pract. 167, 2nd edit.; Smith's Action at Law, 103, 5th edit.)

**Q.**—In actions under twenty pounds, at what stage of the cause should application be made to try before the sheriff?

**A.**—The application is generally made after issue joined: (Smith's Action at Law, 103, 5th edit.) But it may be made before: (Arch. New C. L. Pract. 168, 2nd edit.)

**Q.**—In issues tried before the sheriff, is any *nisi prius* record necessary?

**A.**—No; a writ of trial is issued, the form of which is given by the General Rules of 1853: (see Arch. New C. L. Pract. 169, 2nd edit.; Smith's Action at Law, 103, 2nd edit.)

**Q.**—What is the meaning of "withdrawing a juror," and what effect has it?

**A.**—It often happens when neither party feels sufficient confidence to render him anxious to persevere till verdict, that the judge at the trial recommends the parties to withdraw a juror. If the parties consent to it, one of the jurors is desired to withdraw from his fellows, and then the rest of the jury are discharged from giving a verdict. It seems that withdrawing a juror has the effect of putting an end to the action; at least where, from circumstances, it appears that it was the intention of the parties thereby to put an end to the action, and if the plaintiff afterwards either continue the same action, or commence another, for the same cause, the court, upon application, will stay the proceeding. But if, instead of moving to stay the proceedings, the defendant allow the cause to proceed, it will be no objection at the trial: (see Arch. New C. L. Pract. 158, 2nd edit.; Pat. & Mac. C. L. Pract. 347.)

**Q.**—How did the 9 Geo. 4, c. 15 (commonly called Lord Tenterden's Act) affect amendments on the record, where the record and evidence are at variance; and how has the same been further extended by subsequent enactments?

**A.**—The 9 Geo. 4, c. 15, enabled a judge sitting at Nisi Prius, &c., to amend at the trial variances between the record and evidence, on payment of such costs (if any) to the other party as such court or judge thought reasonable; and this power is further extended by the stats. 3 & 4 Will. 4, c. 42, and 15 & 16 Vict. c. 76, s. 222; and the express words of the last statute are, that "all such amendments as may be

necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made:" (see Smith's Action at Law, 82, 133, 5th edit.)

• Q.—Explain the difference between a verdict and a judgment.

A.—A verdict is the unanimous decision or opinion of the jury on the point or issue submitted to them. A verdict is either *general* for the plaintiff or defendant, or *special*, stating all the facts of the case, and leaving it to the court to pronounce the proper judgment: (see Holth. Law Dict. 2nd edit.; Smith's Action at Law, 132, 5th edit.) Judgment is the sentence of the law upon the matter appearing from the previous proceedings in the suit. Judgments are either *interlocutory* or *final*: (see Smith's Action at Law, 158, *et seq.*, 5th edit.)

Q.—In actions upon contracts, &c., where some of the defendants let judgment go by default and others plead, and upon the trial a verdict is found for one or all of the defendants who pleaded, would the jury proceed to assess damages against the defendants who suffered judgment to go by default, or what would be the result?

A.—In actions of contract brought against several defendants, where the writ of summons is specially indorsed (see *ante*, p. 39), and one or more of the defendants have judgment for default of appearance signed against them, and the plaintiff proceeds to declare against the others, with a suggestion of the judgment, and at the trial a verdict is found for the defendants or any of them, the plaintiff cannot afterwards assess damages or obtain final judgment against those who have allowed judgment to go by default: (see Arch. New C. L. Pract. 64, 65, 2nd edit.)

Q.—What is the mode of proceeding on signing a judgment for non-appearance to a writ specially indorsed when there are two defendants, only one of whom appears?

A.—The plaintiff may sign judgment against the one who has not appeared, and before declaring against the other may issue execution thereon, in which case he will be taken to have abandoned his action against the one who has appeared. Instead, however, of issuing execution against the one who allows judgment to go by default, the plaintiff may declare against the one who has appeared, stating by way of suggestion the judgment obtained against the other defendant. But the plaintiff should be cautious in adopting this course, for the same rule still prevails as before the Common Law Procedure Act, 1852, viz., the plaintiff must still prove the joint liability of all the defendants at the trial, in order to recover against one, unless the misjoinder be amended at the trial: (see *Boyles v. Webster*, 21 L. J. (N. S.) 202, Q. B.; Pat. & Mac. C. L. Pract. 114.)

Q.—What is the difference in effect of the plaintiff's being nonsuited, and a verdict for the defendant?

A.—The difference to the plaintiff between a nonsuit and a verdict for the defendant is, that the latter has the effect of for ever barring the plaintiff from attacking the defendant upon the same ground of complaint; while, after a nonsuit, which is only a default, he may commence the same suit again for the same cause of action: (see 3 Steph. Com. 619; Pat. & Mac. C. L. Pract. 352; Smith's Action at Law, 138, 5th edit.)

Q.—Can a plaintiff be nonsuited against his will?

A.—A plaintiff cannot be nonsuited against his will. For, when the

plaintiff is called by the crier, instead of withdrawing himself, he may appear (by himself or his attorney) when the jury are ready to deliver their verdict: (3 Steph. Com. 623, and note, 3rd edit.; Pat. & Mac. C. L. Pract. 352.)

Q.—If evidence, legally inadmissible, be received on a trial, what remedy has the party injured thereby?

A.—If the judge, at the trial, admit evidence which ought not to be received, the court will grant a new trial, without considering what effect it had or was calculated to have upon the jury, or whether there was evidence sufficient to sustain a verdict. But the evidence must be objected to by the counsel for the opposite party, or the court will not grant a new trial: (Arch. New C. L. Pract. 484, 2nd edit.) A bill of exceptions also lies in cases where the judge wrongfully admits evidence: (Id. 152.)

Q.—State generally some of the cases in which the courts will grant a new trial; and mention in actions for the recovery of debts what is the amount recovered under which a common motion for a new trial is prohibited, and what is the rule on writs of trial before the sheriff.

A.—The following are some of the cases in which new trials are granted: for misdirection by the judge to the jury, in point of law, and the jury are thereby induced to find a wrong verdict; for the rejection of evidence by the judge; for the wrongful admission of evidence by the judge; where the verdict is against evidence. But by stat. 17 & 18 Vict. c. 125, s. 1, where a case is tried before a judge without jury, the verdict of the judge shall not be questioned upon the ground of its being against the weight of evidence. A new trial is also granted for smallness of damages; for excessive damages; or for default in the jurors, &c. If the amount recovered is under twenty pounds, the court will seldom grant a new trial, unless for fraud or misdirection, or malpractice, or unless the action is brought to try some right. But this does not apply to cases where the trial has been before the sheriff under a writ of trial; in such cases the court will grant a new trial, unless the verdict be under five pounds: (see Arch. New C. L. Pract. 481 to 497, 2nd edit.)

Q.—Within what time after verdict or nonsuit must application be made for a new trial?

A.—When the cause has been tried at the assizes, or in London or in Middlesex in vacation, the motion must be made within the first four days of the following term, Sunday not included, unless entered in a list of postponed motions by leave of the court. But if the cause had been tried in term, the motion cannot be made after the expiration of four days from the day of trial: (Arch. New C. L. Pract. 501, 2nd edit.) The rule is a rule *nisi*: (Id. 503.) And by stat. 17 & 18 Vict. c. 125, s. 33, in every rule *nisi* for a new trial, or to enter a verdict or nonsuit, the grounds upon which such rule shall have been granted shall be shortly stated therein.

Q.—Within what period must application be made for a new trial in causes tried before the sheriff?

A.—The motion must be made within four days after the return of the writ, or within such time as the sheriff's deputy, or judge who tried the cause, or judge at chambers, shall have given for that purpose. But if the cause be tried in vacation, the rule may be moved for within the



first four days of the following term : (see Arch. New C. L. Pract, 500, 501, 2nd edit. ; Smith's Action at Law, 104, 5th edit.)

**Q.**—Is there any appeal from a judgment of a superior court on an application for a new trial? and what entitles a party desirous of appealing to do so?

**A.**—In all cases of motions for a new trial upon the ground that the judge has not ruled according to law, if the rule to show cause be refused, or, if granted, be then discharged or made absolute, the party decided against may appeal, provided any one of the judges dissent from the rule being refused, or, when granted, being discharged or made absolute, as the case may be ; or provided the court in its discretion think fit that an appeal shall be allowed ; provided that where the application for a new trial is upon a matter of discretion only, as on the ground that the verdict was against the weight of evidence or otherwise, no such appeal shall be allowed : (17 & 18 Vict. c. 125 ; Smith's Action, 152, 5th. edit. ; Pat. & Mac. C. L. Pract. 405, 1296.)

**Q.**—What are the modes of proceeding in a town cause by which a defendant can compel the plaintiff to proceed to trial after issue joined, and how soon after issue joined can such proceeding be taken?

**A.**—Where issue has been joined in a town cause in any term (for instance, Hilary Term), or in the vacation before it, and the plaintiff neglects to bring the issue on to be tried in or before the following (Easter) term, or during the vacation after it, the defendant may give twenty days' notice to the plaintiff to bring the issue on to be tried at the sittings next after the expiration of such notice. And if the plaintiff afterwards neglect to give notice of trial for such sittings, or to proceed to trial in pursuance of the said defendant's notice, the defendant may suggest on the record that the plaintiff has failed to proceed to trial, although duly requested so to do (which suggestion shall not be traversable, but only be subject to be set aside if untrue), and may sign judgment for his costs. It is, however, provided that the court or a judge may extend the time for proceeding to trial : (see 15 & 16 Vict. c. 76, s. 101 ; Arch. New C. L. Pract. 107, 2nd edit.)

**Q.**—If a plaintiff makes default in proceeding to the trial of a cause, is there any, and what, course by which a defendant can bring the cause on for trial?

**A.**—Yes ; by giving the notice and taking the proceedings detailed in the preceding answer. If the cause is a country cause, and issue has been joined in Hilary or Trinity Term, or in the vacation before it, and the plaintiff has neglected to bring the issue on to be tried at or before the *second* assizes following such term, the defendant may give the notice above-mentioned ; or if issue have been joined in Easter or Michaelmas Term, or in the vacation before it, and the plaintiff has neglected to bring the issue on to be tried at or before the *first* assizes after such term, the defendant may give the notice above mentioned : (15 & 16 Vict. c. 76, s. 101.) It will be seen the only difference between town and country causes is in the time at which the notice is given, the effect being the same : (see Smith's Action at Law, 117, 5th edit.)

**Q.**—When a plaintiff has proceeded to trial and has obtained a verdict, which is afterwards set aside, and a new trial obtained, and the plaintiff does not give fresh notice, what steps should the defendant take to terminate the cause?

**A.**—If, after a new trial is granted, the plaintiff do not proceed to trial, there is no mode of compelling him to do so; but the defendant, if he will, may take the cause down to trial by proviso, or if the rule were granted to either party on payment of costs, and he has not paid them, the other party may move to discharge it: (see Arch. New C. L. Pract. 505, 2nd edit.)

**Q.**—Where a plaintiff takes a record down for trial at the assizes, but the cause goes over by reason of the judge not reaching it, or not being able to try it, can the defendant give the plaintiff notice to proceed? if not, what remedy has he to make an end of the cause?

**A.**—The defendant cannot give the plaintiff notice to proceed, when the cause goes over by reason of the judge not reaching the assizes, or not being able to try it; for the plaintiff is not in fault: (12 Jur. 520.) And the defendant has no remedy, but must wait until the cause be called on and tried.

**Q.**—What is the derivation and meaning of the term "*Nisi Prius*," as applied to the courts holden for the trial of causes in the superior courts of Westminster Hall?

**A.**—There was a sort of real action called an *assize*, which was tried in the very county in which the land in question lay, by judges holding the King's commission for that purpose, and who were called *justices of assize*. The stat. 13 Edw. 1, c. 30, usually called the Statute of *Nisi Prius*, therefore enacted that these justices should try other issues, return the *verdicts* into the court above, and, in order to enable them to do so, the writ of *venire* (now abolished) was altered, and instead of ordering the sheriff to bring the jurors to the Court at Westminster, he was ordered to bring them to Westminster on a certain day *nisi prius*, i. e., *unless before* that day the justices of assize came into the county, for then the statute rendered it his duty to return the jury, not to the court but to the justices of assize. Hence it is that judges are said to sit at *nisi prius*, and trials to take place at the *assizes*; though the real action of assize long ago became obsolete, and is now, indeed, altogether abolished by the 3 & 4 Will. 4, c. 27: (see further, 3 Steph. Com. 421, &c.; Smith's Action at Law, 113, 5th edit.)

**Q.**—What is a feigned issue; in what cases is it resorted to, and by what authority is it framed?

**A.**—A feigned issue is a fictitious one: (Holth. Law Dict. 2nd edit.) It is a mode adopted without any regular set of pleadings for determining some question or questions of fact by a jury, either directed by a court of equity, or by a judge at law, under the Interpleader Act, or the Tithe Commutation Act. So the proceedings under the Common Law Procedure Act, 1852, s. 42, and the Procedure Act, 1854, s. 1, are of this nature. The 8 & 9 Vict. c. 99, after reciting that many important questions are now tried in the form of feigned issues, by stating that a wager was laid between two parties interested in respectively maintaining the affirmative and negative of certain propositions, but that such questions may be as satisfactorily tried without such form, it enacts, that in every case where any court of law or equity may desire to have any question of fact decided by a jury, such court may direct a writ of summons to be sued out by such person or persons, and direct who are to be plaintiffs and who defendants therein, in the form set out in the schedule to the act, with such alterations and additions as the court may

think proper, and thereupon the proceedings are to go on, and be brought to a close as heretofore in feigned issues. The form given is not compulsory. The act applies to feigned issues strictly so called.

Q.—On the trial of a cause the defendant succeeds upon one of several issues, which goes to the whole cause of action, and the plaintiff on the other issues. Which party is entitled to the *postea*?

A.—In the case put, the defendant would be entitled to the *postea*: (Pat. & Mac. C. L. Pract. 443; Chit. Arch. 436, 9th edit.)

## JUDGMENT.

Question.—State the different kinds of judgments.

Answer.—Unless the court be equally divided in opinion (in which case *no judgment can be given*), judgment is for the plaintiff by the defendant's *confession* or *default*; for the defendant upon *nonsuit*, *non pros.*, *retraxit*, *nolle prosequi* (a *retraxit* or *nolle prosequi* is where the plaintiff of his own accord declines to follow up the action. But there is this difference between them; a *retraxit* is a bar to any future action for the same cause, whereas a *nolle prosequi* is not, unless made after judgment.) So for *discontinuance* or *stet processus* (a *stet processus* is entered, when it is agreed, by leave of the court, that all further proceedings shall be stayed; though in form a judgment for the defendant, it is generally like a *discontinuance*, in point of fact, for the benefit of the plaintiff, and entered on his application, it does not carry costs.) And for either party on *demurrer*, issue of *nul tiel record*, or verdict. Judgments are either *interlocutory* or *final*: (see Smith's Action at Law, 158, 5th edit.)

Q.—What is the difference between interlocutory and final judgment?

A.—An interlocutory judgment in an action at law signifies a judgment which is not final, but which is given upon some plea, proceeding, or default occurring *in the course* of the action, and which does not terminate the suit. The most common kind of interlocutory judgments are those which are given when the right of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained, which is a matter that cannot be done without the intervention of a jury: this happens when the defendant suffers judgment by default or confession, or upon a demurrer, in any of which cases if the demand sued for be damages, unless the defendant will admit that they amount to the whole sum laid in the declaration, some further inquiry must take place. Therefore, the judgment given by the court in such cases is interlocutory and not final, because the court knows not what damages the plaintiff has sustained, which must be ascertained by writ of inquiry before the sheriff, acting by his deputy, or where the damages are substantially a matter of calculation, by reference to a Master. A final judgment puts an end to the action altogether, by declaring that the plaintiff is or is not entitled to recover: (see Smith's Action at Law, 169, *et seq.*, 5th edit.)

Q.—When action in debt is brought upon a bond in a penalty conditioned for the performance of covenants, or for the faithful conduct of

a party, and the defendant does not plead, but suffers judgment by default, what steps, if any, should be taken by the plaintiff before the execution can be issued under the judgment ?

A.—The plaintiff, before he can issue execution, must assign breaches, and proceed to get the damages assessed thereon under a writ of inquiry. The subject is governed by stat. 8 & 9 Will. 3, c. 11, s. 8, by which in any action on a bond or penal sum, for nonperformance of any covenants or agreements, or of an award or any other specific act, although judgment be entered up for the amount of the penalty, yet the plaintiff can only issue execution for the amount of the damages sustained, assessed as above-mentioned : (see Arch New C. L. Pract. 185, 2nd edit.)

Q.—How soon may a successful party enter up judgment after trial ; name the different periods ; and how can the other party get that time enlarged ?

A.—By the 15 & 16 Vict. c. 76, s. 120, and Rule 57, H. T. 1853, it is provided that when a plaintiff or defendant has obtained a verdict in term, or in case a plaintiff has been nonsuited at the trial, in or out of term, judgment may be signed and execution issued thereon in fourteen days, unless the judge who tries the cause, or some other judge, or the court, shall order execution to issue at an earlier or later period, with or without terms. If the other side wish to stay judgment and move for a new trial, &c., the proper course is for counsel to apply to the judge at the trial, or to a judge at chambers, to stay execution, in which latter case a summons must be taken out, and served and attended in the usual way : (see Chit. Arch. 485, 9th edit. ; Smith's Action at Law, 145, 5th edit.)

Q.—What was the meaning of judgment as in case of a nonsuit ; and what was its origin ?

A.—By stat. 14 Geo. 2, c. 17, s. 1, it was enacted, that where issue was joined, and the plaintiff neglected to bring such issue to trial, according to the course and practice of the court, then it should be lawful for the judges of the court, upon motion made in open court (due notice thereof having been given), to give the same *judgment for the defendant as in cases of nonsuit* ; unless, upon just cause and reasonable terms, they should allow a further time for the trial of such issue ; and if the plaintiff neglected to try the issue within the time so allowed, the court gave such judgment as aforesaid. This act was passed to prevent the inconveniences arising from delays of causes after issue joined. It is now repealed by the 15 & 16 Vict. c. 76, by which a new mode of proceeding is substituted : (see Chit. Arch. 1402, 9th edit. and *post*.)

Q.—What are the proceedings under the Common Law Procedure Act, 1852, in lieu of judgment, as in case of a nonsuit ?

A.—The following proceeding is substituted for the former practice as to judgment as in case of a nonsuit, which is abolished, except as to proceedings taken before the commencement of the above act.

When issue is joined in any cause, and the plaintiff has neglected to bring such issue on to be tried within the proper time (which varies according to the term in which issue is joined, and whether the cause be a town or country cause), the defendant may give twenty days' notice to the plaintiff to bring the issue on to be tried at the sittings or assizes (as the case may be), next after the expiration of such notice. If the plaintiff neglect to do this, the defendant may suggest on the record the plaintiff's default (which suggestion is not traversable, but only liable

to be set aside if untrue), and sign judgment for his costs; the court, or a judge, have, however, power to extend the time for proceeding to trial, with or without terms: (see 15 & 16 Vict. c. 76, s. 101; Chit. Arch. 1403, 9th edit.; Smith's Action at Law 117, 5th edit., and *ante*, p. 73.)

**Q.**—After what time must a judgment be revived?

**A.**—By stat. 15 & 16 Vict. c. 76, s. 128, it is enacted, that during the lives of the parties to a judgment, or those of them during whose lives execution may at present issue within a year and a day without a *scire facias*, and within six years from the recovery of the judgment, execution may issue without a revival of the judgment. Therefore, if the judgment is above six years old, it must be revived, even if there has been no change by death of the parties entitled or liable to execution.

**Q.**—If either plaintiff or defendant die after interlocutory and before final judgment, will the action abate, or how must he proceed to final judgment?

**A.**—In case of the death of either party between interlocutory and final judgment, where the cause of action would have survived to or against his personal representative, the proceedings may be continued by writ of revivor, calling upon the defendant, or his representative if he has died, to show cause why damages should not be assessed; and if no cause be shown, the assessment will take place either by writ of inquiry or by the Master, and final judgment signed: (see sect. 140 of the 15 & 16 Vict. c. 76; Smith's Action at Law, 181, 5th edit.)

**Q.**—What proceedings would you take in order to enforce a judgment against the heirs, executors, or administrators of a defendant?

**A.**—You must either revive the judgment by writ of revivor, or obtain leave from the court or a judge to enter a suggestion upon the roll, to the effect that it manifestly appears to the court that the plaintiff is entitled to have execution of the judgment, and to issue execution thereupon: (see sect. 129 of 15 & 16 Vict. c. 76.) Prior to this act a writ of *scire facias* was sued out to enforce a judgment against the heirs, &c., of a defendant: (see Smith's Action at Law, 208, 5th edit.)

**Q.**—Where a plaintiff has obtained a judgment against a defendant in the character of executor or administrator, in respect of future assets, when they may come to such defendant's hands, and such assets afterwards come to his hands, what step should the plaintiff take in order to make such assets available to satisfy the judgment?

**A.**—The plaintiff must proceed either by writ of revivor or suggestion in order to make the assets available to satisfy the judgment: (Arch. New C. L. Pract. 334, 2nd edit.; *ante*, p. 52.) This must formerly have been done by *scire facias*: (Chit. Arch. 878, 7th edit.)

**Q.**—When a judgment has been recovered against the registered officer of a joint-stock company, can it be enforced against the individuals forming the company, and by what means?

**A.**—Yes; the judgment may be enforced against the individuals forming that company by *scire facias*; (Arch. New C. L. Pract. 193, 2nd edit.) By the 15 & 16 Vict. c. 76, s. 132, it is enacted, that all writs of *scire facias*, issued out of the superior courts of common law at Westminster, shall be tested, directed, and proceeded upon in like manner as writs of revivor.

**Q.**—A creditor, having obtained a judgment against a debtor, dies. What is required to be done by his executor, in order that he may be in

a position to attach a debt due to the judgment debtor, with a view to satisfy the judgment recovered by his testator?

A.—If a creditor obtains a judgment against his debtor and dies, and the executor wishes to attach a debt due to the judgment debtor, to satisfy the judgment recovered by his testator, he must revive the judgment in the manner pointed out in the succeeding answer.

Q.—How do you proceed to revive a judgment?

A.—In cases where it shall become necessary to revive a judgment, by reason either of lapse of time, or of change by death, or otherwise, of the parties entitled or liable to execution, the party alleging himself to be entitled to execution may either sue out a writ of revivor, or apply to the court or a judge for leave to enter a suggestion upon the roll, to the effect that it manifestly appears to the court that such party is entitled to have execution of the judgment, and to issue execution thereupon. And upon such application, in case it manifestly appears that the party making the same is entitled to execution, the court or a judge shall allow such suggestion as aforesaid to be entered, and execution to issue thereupon; it is also provided that in case it does not appear that the party is entitled to make the suggestion, and the application is dismissed, the party making the application may, nevertheless, proceed by writ of revivor: (15 & 16 Vict. c. 76, ss. 129, 130.)

Q.—In what cases is the registration of a judgment necessary, and what advantages attend the doing so, and how should the same be registered?

A.—In order to affect lands, &c., in the hands of purchasers, mortgagees, or creditors, the judgment must be first registered, in pursuance of the 1 & 2 Vict. c. 110. For this purpose a memorandum containing the name, abode, and description of the debtor, with the amount of the debt, damages, costs, or money recovered against him, or ordered by him to be paid, together with the date of the registration, and other particulars, must be left with the senior Master of the Court of Common Pleas: (s. 19, and see *post* tit. "Judgment and other Debts.")

Q.—Can Government stocks, funds, or annuities of a judgment debtor be made chargeable with the amount of such judgment debt?

A.—With respect to a judgment being made a charge upon Government stock, &c., it is provided, by the 1 & 2 Vict. c. 110, ss. 14 to 16, and 3 & 4 Vict. c. 82, that a judge of the court in which judgment has been obtained may make an order at chambers that any Government stock, funds, annuities, &c., standing in the name of the debtor, in his right, or in the name of any person in trust for him, shall stand charged with the payment of the judgment debt and interest. This charge cannot be enforced for six months after the order, and is relinquished by the creditor taking the debtor in execution on the judgment: (see Smith's Action at Law, 203, 5th edit.; Arch. New C. L. Pract. 179, 2nd edit.)

Q.—If a *feme sole* obtain judgment, and marry before execution, what must be done in order to execute the judgment?

A.—If a *feme sole* obtain judgment and marry, execution cannot issue in favour of the husband, for he is not mentioned on the record. In such a case a writ of *scire facias* was formerly sued out, reciting the facts as they had happened, and the judgment upon that writ included the husband, and execution might be afterwards sued out upon that judgment. But the proceeding by *scire facias*, for the purpose of reviving a judgment in case of marriage, death, or otherwise, is superseded; and, as

before seen, a writ of *revivor* is now used, or a suggestion entered, for that purpose : (see *Smith's Action at Law*, 208, 5th edit. ; 15 & 16 Viet. c. 79, ss. 128, 129 ; *Arch. New C. L. Pract.* 193, 2nd edit.) The 141st section of the above act does not seem to apply to cases where the marriage takes place *after* judgment.

*Q.*—What is the meaning of a judgment *non obstante veredicto* ; what effect has it upon the action, and what are sufficient grounds to sustain a motion for such a judgment ?

*A.*—Judgment *non obstante veredicto* means judgment notwithstanding the verdict : (*Holth. Law Dict.*, 2nd edit.) A motion for such a judgment, it is said, can only be made by the plaintiff : (*Smith's Action at Law*, 155, 5th edit.) If the plea or pleas pleaded are no answer to the action, and a verdict be thereupon found for the defendant, the court will award the plaintiff judgment *non obstante veredicto*. The effect of this is that the plaintiff has judgment, notwithstanding the defendant obtained the verdict in the action : (see *Arch. New C. L. Pract.* 468, 2nd edit ; *Smith's Action at Law* 155, 156, 5th edit.)

*Q.*—What are the grounds to sustain a motion in arrest of judgment ?

*A.*—For defects in substance, appearing plainly upon the face of the record, not amendable, nor cured by verdict, the court will, in general, arrest the judgment : (*Arch. sup.* ; *Smith sup.*) But by the Common Law Procedure Act, 1852, upon a motion for a judgment *non obstante veredicto* or a motion in arrest of judgment, on account of the omission of some alleged material facts, &c., such omitted facts, &c., may, by leave of the court, be suggested and pleaded to by the opposite party, and brought to trial in the ordinary way ; and if the party making the suggestion succeeds, he will be entitled to the same judgment as if the facts had been originally stated : (see 15 & 16 Viet. c. 76, ss. 141, 142 ; *Smith's Action at Law*, 156, 157, 5th edit.)

*Q.*—At what period must a motion in arrest of judgment, or for judgment *non obstante veredicto*, be made ?

*A.*—The motion, in either case, cannot be made after the expiration of four days from the day of trial, nor in any case after the expiration of the term, or after the expiration of the first four days of the ensuing term, unless entered in a list of postponed motions by leave of the court : (*Rule Gen.* 50 ; *Arch. New C. L. Pract.*, 458, 2nd edit.) The time given, it will be seen, is the same as that allowed for moving for a new trial.

*Q.*—Is there any mode by which a judgment creditor can attach any debts due to the judgment debtor, and how ?

*A.*—Yes ; by the 17 & 18 Viet. c. 125, s. 61, it is enacted, that a judge may, upon the *ex parte* application of any judgment creditor, upon affidavit of himself or his attorney, stating that judgment has been recovered, and that it is still unsatisfied, and the nature of the action (see *Crewes v. Morrison*, 26 L. T. Rep. 238), and that any other person is indebted to the judgment debtor, and is within the jurisdiction, order that all debts owing by such third person (to be called the *garnishee*) to the judgment debtor shall be attached to answer such judgment debt. And, by sect. 60, the judgment creditor may obtain a discovery of the debts due to the judgment debtor by obtaining a judge's order for his examination thereon, and for production of his books and documents. Provisions are also made for the recovery of such debt from the garnishee : (see sects. 61 to 66 ; *Smith's Action at Law*, 204, 5th edit.)

**Q.**—Suppose an action in debt on a money bond to secure one sum of money payable at one time, and a similar action to recover a sum payable by instalments, and a similar action for nonperformance of covenants, and judgment by default obtained in each action, is there any, and what, difference in the steps to be taken before the plaintiff can issue execution?

**A.**—In actions in debt on bond, to secure a gross sum of money payable at one time, the plaintiff may issue execution on the judgment by default, without taking any primary steps. But in actions on a bond conditioned for payment of money by instalments, or for nonperformance of covenants, the plaintiff must first assign breaches, and proceed to get his damages assessed by writ of inquiry, before he can issue execution. The subject is governed by stat. 8 & 9 Will. 3, c. 11, s. 8: (see Arch. New C. L. Pract. 185, 2nd edit.; *ante*, p. 76.)

**Q.**—In how short a period can judgment be obtained when all the proceedings are by default?

**A.**—If the writ is specially indorsed, and it is served upon the defendant within the jurisdiction of the court, in default of appearance, according to the exigency thereof (*i. e.*, eight days after service, including the day of service), the plaintiff may sign final judgment: on this judgment no proceeding in error lies. The plaintiff must, however, first file an affidavit of personal service of the writ of summons, or leave to proceed under the provisions of this act, and a copy of the writ of summons: (15 & 16 Vict. c. 76, s. 27.) If the writ is not specially indorsed, and the defendant does not appear, the plaintiff may (on filing an affidavit of the personal service of the writ, or judge's order to proceed as if personal service had been effected, and a copy of the writ), file a declaration indorsed with a notice to plead in eight days, and sign judgment by default at the expiration of the eight days: (sect. 28; and see Arch. New C. L. Pract. 63, 64, 2nd edit.; Smith's Action at Law, 39, 5th edit.)

## COSTS.

**Question.**—In what cases is a plaintiff not entitled to any costs?

**Answer.**—In *qui tam* actions, when the plaintiff sues as a common informer, he is not entitled to any costs, unless they are expressly given to him by the act on which he sues; this sort of action not coming within the provisions of the Statute of Gloucester: (Smith's Action at Law, 170, 5th edit.) And by the 3 & 4 Vict. c. 24, in actions of trespass, or trespass on the case, if the plaintiff recovers, by the verdict of a jury, less than 40s. damages, he will not be entitled to any costs whatever, unless the judge or presiding officer before whom the verdict is obtained immediately afterwards certifies on the back of the record, or writ of trial, or inquiry, that the action was brought to try a right, besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance



in respect of which the action was brought was wilful and malicious: (Smith's Action at Law, 173, 5th edit.) So, when the plaintiff brings his action in a superior court, where a superior court has neither an exclusive nor concurrent jurisdiction, he will not be entitled to any costs: (see 9 & 10 Vict. c. 95; 13 & 14 Vict. c. 61; 15 & 16 Vict. c. 54, s. 4; 19 & 20 Vict. c. 108.)

Q.—What is the meaning of double costs?

A.—The mode of computing double costs is thus:—first, the amount of the single costs, including the expenses of witnesses, counsel's fees, &c., is ascertained; and then one-half of that amount is added to it, and the two sums constitute what are called double costs: (see Arch. New C. L. Pract. 212, 2nd edit.) The stat. 5 & 6 Vict. c. 97, however, takes away the right to double costs in most cases, and in lieu thereof the costs between party and party are to be recovered, and no more.

Q.—On a judgment *non obstante veredicto* is either party entitled to costs?

A.—Yes. By stat. 15 & 16 Vict. c. 76, s. 145, it is enacted, that upon judgment *non obstante veredicto*, the court shall adjudge the party, against whom such judgment is given, the costs occasioned by the trial of any issues of fact, arising out of the pleading, for defect of which such judgment is given, upon which such party shall have succeeded; and such costs shall be set off against any money or costs adjudged to the opposite party, and execution may issue for the balance, if any. Prior to this act neither party was entitled to costs. *Smith's Action at Law* 158-61

Q.—In what cases may you compel a plaintiff to give security for costs, and when must the application be made?

A.—The following are the cases in which a plaintiff is required to give security for costs. Where the plaintiff is permanently resident abroad, even although he be king of a foreign state, or although he went abroad since the commencement of the action; but where the plaintiff is abroad for a temporary purpose the court will not compel him to give security for costs. So, if an Englishman be abroad by compulsion, as in the case of naval and military officers, and other persons engaged abroad in the public service, security will not be ordered. Nor will security be ordered merely because the plaintiff is poor, or even insolvent, nor on the ground that the plaintiff is lunatic. But if after commencing the action the plaintiff be convicted of felony, the court will stay the proceedings until security be given: (Arch. New C. L. Pract. 576, *et seq.*, 2nd edit.) And by stat. 17 & 18 Vict. c. 125, s. 93, if any person shall bring an action of ejectment after a prior action of ejectment for the same premises has been unsuccessfully brought by such person against the same defendant, the court or a judge may, on the application of the defendant, at any time after he has appeared to the writ, order the plaintiff to give the defendant security for the payment of his costs, and stay the proceedings until such security be given: (Smith's Action at Law, 243, 5th edit.) By Rule Gen. 22, an application to compel the plaintiff to give security for costs must, in ordinary cases, be made before issue joined. After issue joined it must be shown that the facts on which the defendant relies in support of his application have just come to his knowledge, and that no step has been taken by him in the cause subsequently to such knowledge: (Arch. New C. L. Pract. 580, 2nd edit.; Pat. and Mac. C. L. Pract.; Smith's Action at Law, 97, 5th edit.)

**Q.**—If the plaintiff be a foreigner, or resident out of the jurisdiction of the court, has a defendant any mode of obtaining or securing the payment of his costs in case the plaintiff should fail?

**A.**—Yes; by compelling the plaintiff to give security for them: (see *Smith, sup.*; *Arch., sup.*)

**Q.**—If one of several defendants, who defend jointly, be acquitted, will he now, as formerly, be restricted to 40s. only for his costs, or in what proportion will he be entitled?

**A.**—No; in such a case the defendant acquitted shall have judgment for and recover his reasonable costs, unless the judge before whom the cause shall be tried shall certify upon the record that there was reasonable cause for making such person a defendant in such action: (3 & 4 Will. 4, c. 42, s. 32; *Arch. New C. L. Pract.* 204, 2nd edit.; *Smith's Action*, 177, 5th edit.)

**Q.**—What is necessary to enable a party to include, in his execution, the costs of making an order a rule of court?

**A.**—An affidavit must be made and filed that the order has been served on the party or his attorney, and disobeyed: (*Rule Gen.* 159; *Arch. New C. L. Pract.* 644, 2nd edit.)

**Q.**—What sum is it necessary to recover for damages in an action for slander, to entitle the plaintiff to costs of increase?

**A.**—If in an action for *oral slander* the plaintiff recovers less than 40s. he will be entitled to no more costs than damages: (21 Jac. 1, c. 16.) And the judge has no power to certify to give him increased costs. But this stat. does not extend to cases where the words are actionable only by reason of special damage, such action coming within the provisions of the 3 & 4 Vict. c. 24: (see *Gray on Costs*, 108, and note; also *Smith's Action at Law*, 172, 5th edit.)

**Q.**—In actions for damages in trespass, or on the case, where the sum sought to be recovered by the verdict of a jury shall not amount to 40s., is the plaintiff entitled to costs as of course; if he is not so entitled, is he deprived of them by any, and what, particular statute?

**A.**—In actions of trespass or trespass on the case, where the plaintiff does not recover by the verdict of a jury more damages than 40s., he is not entitled as of course to any costs whatever. He is deprived of them by stat. 3 & 4 Vict. c. 24: (see *Smith's Action at Law*, 173, 5th edit. and below.)

**Q.**—Supposing a plaintiff not entitled to costs where the damages recovered by verdict do not amount to 40s. in the actions stated in the last preceding question, is there any, and what, application necessary so as to entitle a plaintiff to the costs of suit; and to whom, and when, should such application be made?

**A.**—To entitle the plaintiff to the costs of suit, where the damages recovered are under 40s., in trespass or case, he must immediately after the trial get the judge or presiding officer before whom the verdict is obtained to certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was really brought to try a right, besides the mere right to recover damages for the trespass or grievance for which the action was brought, or that the trespass or grievance in respect of which the action was brought was wilful and malicious: (3 & 4 Vict. c. 24; *Smith's Action at Law*, 173, 5th edit.) But the 3rd section of the above act provides that nothing therein contained shall extend to deprive

the plaintiff of costs in any action or actions brought for a trespass or trespasses over any lands, &c., or for entering into any dwellings, outbuildings, or premises in respect of which a notice not to trespass has been previously served by or on behalf of the owner or occupier of the land trespassed over, upon, or left at the last reputed place of abode of the defendant or defendants, in such action or actions : (Smith's Action at Law, *supra*.) Although the statute requires the certificate to be given "immediately" after the trial, it is, however, construed to mean within a reasonable time : (Arch. New C. L. Pract. 129, 2nd edit.)

Q.—When a verdict has been obtained in the superior courts for less than 20*l.* on contract, and the judge does not certify for costs, what steps can the plaintiff take to obtain his costs, and what would be sufficient grounds to support his application ?

A.—As the action might have been brought in the County Court, the plaintiff will have to apply under the statute 15 & 16 Vict. c. 54, s. 4, to obtain his costs (Gray on Costs, 153) ; this act provides that where the plaintiff is not entitled to costs by reason of the 11th section of 13 & 14 Vict. c. 61, if the plaintiff shall make it appear to the satisfaction of the court in which such action was brought, or to the satisfaction of a judge at chambers upon summons, that such action was brought for a cause in which concurrent jurisdiction is given to the superior courts by stat. 9 & 10 Vict. c. 95, s. 128, or for which no plaint could have been entered in any such County Court, or that such action was removed from a County Court by certiorari, or that there was sufficient reason for bringing such action in the court in which it was brought ; then, and in any of such cases, the court in which the action is brought, or a judge at chambers, shall thereupon by rule or order direct that the plaintiff shall recover his costs : (see Arch. New C. L. Pract. 202, 203, 2nd edit. ; Gray on Costs, 143, *et seq.*)

Q.—Does it make any difference if the defendant suffer judgment to go by default ?

A.—The 19 & 20 Vict. c. 108, enacts that where an action of contract is brought in one of Her Majesty's superior courts of record to recover a sum not exceeding 20*l.*, and the defendant lets judgment go by default, the plaintiff shall recover no costs, unless upon an application to such court, or to a judge thereof, it is otherwise ordered ; (see sect. 30.) This section turned the old law completely round, for under the 13 & 14 Vict. c. 61, the plaintiff was entitled to his costs as of course, if the defendant let judgment go by default. Shortly after the passing of the 19 & 20 Vict. c. 108, however, it was decided in a case of *Heard v. Edey*, that on a judgment by default in the superior courts, where the sum sought to be recovered does not exceed 20*l.*, the costs are regulated by the same rule as in the case of a judgment after verdict. And it was held, in this case, that it is imperative on the judge to whom the application for costs is made, to make an order granting them in all cases of concurrent jurisdiction : (28 L. T. Rep. 291.) And now for all writs under 20*l.* a form of notice is given to be indorsed on such writ, which states that if judgment be signed for default of appearance, the plaintiff will, without summons, apply to a judge for his costs, unless before such judgment notice be given by the defendant or his attorney that such application will be opposed, and unless this notice be given the costs are allowed as of course where the superior courts have concurrent jurisdiction.

Q.—A. has an action brought against him by B., a carpenter, for, say, 250*l.* A. considers the charge exorbitant, and proposes, through his

attorney, to pay B. 170*l.*, and his costs then incurred. B. declines it. This is at an early stage of the cause ; say after writ served, or after declaration, and before plea. Is there any mode by which A. can pay or offer to pay that amount to B., so as to prevent his being liable for costs, provided B. does not succeed in recovering more than 170*l.*?

A.—A. must pay the 170*l.* into court, and plead the payment. If B. does not recover more than the amount so paid into court, but a verdict is given for A., B. will not be entitled to any costs, but will have to pay A.'s costs from the commencement : (see 15 & 16 Vict. c. 76, s. 73 ; Arch. New C. L. Pract. 91, 93, 2nd edit. ; Gray on Costs, 295.) Rule 12, H. T. 1853, does not apply when money is paid into court to the whole cause of action.

Q.—Where a summons is taken out before declaration to stay proceedings on payment of a certain sum stated in the summons, with costs, and a judge refuses to make any order because the plaintiff claims a larger sum, and so indorses the summons, and the plaintiff proceeds, and upon the defendant pleading, he pays the sum offered by the summons into court, and the plaintiff afterwards (without any special circumstances to justify his refusing the money when offered by the summons) takes the sum out of court, and replies that the money is accepted in full discharge of the action, and applies to have his costs taxed, what costs is a plaintiff, under these circumstances, entitled to ?

A.—Under such circumstances the court will allow the plaintiff his costs up to the time of the offer only ; and not to the time of paying the money into court ; and will also make him pay the defendant the costs incurred by him since the offer. The court do this on the presumption that the plaintiff refused the sum offered merely for the purpose of making costs : (Arch. New C. L. Pract. 93, 2nd edit. ; Gray on Costs, 307, 308.)

Q.—Is the defendant entitled to any, and what, costs, under the circumstances stated in the last question ?

A.—Yes ; the costs incurred by the defendant after the offer : (see *supra* ; and see generally hereon, Chit. Arch. 1284, &c. 9th edit.)

Q.—If a plaintiff discontinue his action after a plea of *puis darrien continuance*, will he have to pay costs ; and, if any, what costs ?

A.—The plaintiff may have a rule or order to discontinue after a plea of *puis darrien continuance*, without payment of any costs ; but he is entitled to his costs up to the plea : (Rule H. T. 1853 ; Chit. Arch. 860, 9th edit.)

Q.—Where a plaintiff or defendant obtains a rule for a special jury, and the party obtaining the rule and procuring the special jury succeeds at the trial, but omits to obtain the judge's certificate that it was a cause proper to be tried by a special jury, what effect would the want of such certificate have as to allowing the costs of the special jury in taxing the general costs of the cause ?

A.—If the party obtaining the special jury neglect to obtain the judge's certificate that it was a fit cause to be tried by a special jury, he will not be allowed the costs of the special jury, although he be successful at the trial : (see Smith's Action at Law, 141, 5th edit. ; Arch. New C. L. Pract. 221, 2nd edit.)

Q.—When the rule granting a new trial is silent as to costs, and the verdict on the second trial is the same as on the first, how are the costs of the first trial disposed of ?

**A.**—By Rule Gen. 54, if a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second; and never to the party who was unsuccessful at the first trial: (Arch. New C. L. Pract. 506, 2nd edit.; Smith's Action at Law, 35, 5th edit.)

**Q.**—A new trial is granted in a case where the plaintiff has obtained a verdict, "the costs to abide the event." The verdict upon the second trial is given for the defendant. To what costs is the defendant entitled?

**A.**—The defendant is entitled to the costs of the second trial only. If the same party had succeeded at both trials he would have been entitled to the costs of both: (see Arch. New C. L. Pract. *supra*.)

**Q.**—Where a new trial is granted on the ground of the verdict being against evidence, what is the rule as to the costs of the first trial? Does this rule apply where there has been more than two trials?

**A.**—By the Common Law Procedure Act 1854, it is provided that when a new trial is granted on the ground that the verdict was against evidence, the costs of the first trial shall abide the event, unless the court shall otherwise order: (sect. 44.) But, as before seen, this section is very much qualified by Rule Gen. 54, which declares that if the rule does not provide for it, the costs of the first trial are not to be allowed. And where the costs are to abide the event, the same party must succeed on both trials to entitle him to the costs of both. When a defendant obtained a new trial, the costs to abide the event, and succeeded on the new trial, but the verdict was again set aside, the rule being silent as to costs, and the plaintiff succeeded on the third trial, the plaintiff was held entitled to the costs of the first and the last trial: (see Pat. & Mac. C. L. Pract., 403; Chit. Arch. 1447, 9th edit.)

**Q.**—When, as a general rule, are new trials granted on payment of costs, and when without costs?

**A.**—Where the verdict is against the evidence but not perverse (but see hereon *sup.*), or when the application is made on the ground of surprise or the like, the rule is generally granted only on payment of costs. But if the verdict be perverse, or if the plaintiff has, out of deference to the judge, submitted to an erroneous nonsuit, a new trial is granted without payment of costs: (see Arch. New C. L. Pract.; Chit. Arch. 1446, 9th edit.)

**Q.**—If some issues are found for the plaintiff, and others for the defendant, how does it affect the costs, and how do the affidavits of increase differ to get the witnesses allowed to the respective parties?

**A.**—By the 15 & 16 Vict. c. 76, s. 81, it is enacted, "that the costs of any issue, either of fact or law, shall follow the finding or judgment upon such issue, and be adjudged to the successful party, whatever may be the result of the other issue or issues:" (see also Rule Gen. 62; Smith's Action at Law, 177, 178, 5th edit.; Arch. New C. L. Pract. 205, 2nd edit., and *post*.) In the affidavits of increase the plaintiff must swear that the witnesses were necessary on the issues found for him; and the defendant must swear that his witnesses were necessary on the issues found for him exclusively and solely, and not on any of the issues found against him: (Chit. Arch. 1381, 7th edit.; and see Gray on Costs, 70, *et seq.*)

**Q.**—If some issues be found on a trial for the plaintiff, and others for the defendant, how does it affect the costs, and which party has the costs of the cause?

*A.*—As before stated, the costs of any issue, either of fact or law, shall follow the finding or judgment upon such issue, and be adjudged to the successful party, whatever may be the result of the other issue or issues. The party who substantially succeeds is entitled to the costs of the cause. And by Rule Gen. 62, if the party entitled to the general costs of the cause obtain a verdict on any material issue, he will also be entitled to the general costs of the trial; but if no material issue in fact be found for the party otherwise entitled to the general costs of the cause, the costs of the trial shall be allowed to the opposite party: (see *Smith's Action at Law*, 178, 179, 5th edit.; *Pat. & Mac. C. L. Pract.* 470, *et seq.*)

*Q.*—In an action brought by a pauper, to which three pleas are pleaded, and three issues joined, the defendant recovers a verdict on two issues, being the material issues; but the plaintiff recovers on one issue, though to a certain extent an immaterial one, who will be entitled to the costs; and are the plaintiff's costs on the issues found for him to be deducted from the defendant's?

*A.*—As above seen, the costs of any issues, whether of fact or law, are to follow the finding or judgment, whatever may be the result of the other issue or issues. But a pauper plaintiff is not obliged to pay costs to the defendant, interlocutory or final. Also by Rule Pl. H. 1853, a person admitted to sue *in formâ pauperis* shall not in any case be entitled to costs from the opposite party, unless by order of the court or a judge; (see *Arch. New C. L. Pract.* 354, 2nd edit.; *Gray on Costs*, 253, *et seq.*; *Chit. Arch.* 1212, 9th edit.)

*Q.*—What is the effect of withdrawing a juror on a trial as to costs?

*A.*—Each party will have to pay his own costs: (*Arch. New C. L. Pract.* 158, 2nd edit.; *Chit. Arch.* 376, 9th edit.)

*Q.*—When are executors or administrators liable personally to pay the costs of an action brought by or against them?

*A.*—In actions brought by executors or administrators, they are now, by stat. 3 & 4 Will. 4, c. 42, s. 31, made liable to costs like other persons, *unless the court otherwise order*; and it has been intimated that the court will not interfere to assist them, unless in cases where the action has failed from something like fraud on the part of the defendant. Before this statute they were, in most cases, exempted from the payment of costs if they were nonsuited, or the defendant had a verdict: (see *Smith's Action at Law*, 176, 5th edit.; *Gray on Costs*, 227, 228.) In actions against them, if an executor or administrator plead a plea which admits his character of executor, &c., and it be found against him, the judgment will be that the plaintiff recover against him the debt or damages, and costs, to be levied of the goods of the testator, if he have so much in his hands, and if not, then the costs to be levied of the proper goods and chattels of the defendant. If he plead *ne unques executor or administrator* only, and it be found against him, the judgment will be that both debt and costs be levied *de bonis testatoris si, &c., et si non, &c., de bonis propriis*: (see further *Arch. New C. L. Pract.* 333, 2nd edit.; *Gray on Costs*, 229, *et seq.*)

*Q.*—When an infant plaintiff is nonsuited, or has a verdict against him, who is liable to the payment of costs?

*A.*—The *prochein amy* of the infant is liable for the costs: (*Arch. New C. L. Pract.* 341, 2nd edit.; *Chit. Arch.* 1169, 9th edit.)

*Q.*—When a judge grants an order to examine witnesses in a cause,

and they afterwards appear at the trial, and are examined, what becomes of the costs of the commission ?

A.—If the interrogatories are not given in evidence, the costs of them are not allowed : (Gray on Costs, 364 ; Chit. Arch. 306, 9th edit.)

Q.—In a case where a rule is obtained to show cause why proceedings should not be set aside for irregularity, with costs, and the rule be discharged generally, without an express direction as to costs, what becomes of them ?

A.—The rule is to be understood as discharged with costs ; the unsuccessful party will therefore have to pay them : (Rule 137, H. T. 1853 ; Chit. Arch. 1381, 9th edit.)

Q.—Must the unsuccessful party under an award wait until the time for setting aside the award has expired before he can tax his costs ?

A.—No ; he may tax his costs prior to the expiration of the time for setting aside the award : (Rule 170, H. T. 1853 ; *O'Toole v. Potts*, 28 L. T. Rep. 248.)

Q.—If a plaintiff commence an action in covenant, debt, detinue, or assumpsit in any of the superior courts of record, and shall not recover a sum exceeding 20*l.*, is any step necessary under 13 & 14 Vict. c. 61, to deprive him of his costs ?

A.—No ; the defendant need not take any step to deprive the plaintiff of costs under the 13 and 14 Vict. c. 61 : (see Arch. New C. L. Pract. 202, 2nd edit. ; Chit. Arch. 445, 9th edit.)

Q.—What actions ought to be brought in the County Court, and what penalty is imposed when an action which ought to be so brought is brought in a superior court ?

A.—If any action of covenant, debt, detinue, or assumpsit (not being for breach of promise of marriage) be commenced in any of the superior courts of record, and the plaintiff does not recover more than 20*l.*, or if any action commenced in the superior courts in trespass, trover, or case (not being an action for malicious prosecution, libel, slander, or for seduction), and the plaintiff do not recover more than 5*l.*, he shall have judgment to recover such sum only, and no costs, unless the judge certifies on the back of the record (13 & 14 Vict. c. 61, s. 12), or an order is obtained for the allowance of costs under sect. 4 of the 15 & 16 Vict. c. 54 : (see Arch. New C. L. Pract. 202, 2nd edit. ; Chit. Arch. 445, 9th edit., and *ante*, p. 82 ; see also *post*, tit. "County Courts.")

Q.—In *scire facias*, if the plaintiff obtain judgment by default or otherwise, is he entitled to costs ; and, if so, does the right accrue at common law, or is it given him by statute ?

A.—At common law no costs were recoverable in proceedings by *scire facias*, but were given by stat. 8 & 9 Will. 3, c. 11. But this statute did not entitle a plaintiff to recover costs if he obtained a judgment by default, but they are given by stat. 3 & 4 Will. 4, c. 42, s. 34 : (see Gray on Costs, 401, 402 ; Smith's Action, 168, 5th edit.)

Q.—State the result as to costs where, in an action of libel, the plaintiff recovers only 5*s.*

A.—In such case the plaintiff will not be entitled to any costs, unless the judge certify that the act complained of was wilful and malicious : (3 & 4 Vict. c. 24.) And it seems that, in order to justify the judge in

certifying under this statute that the act complained of was malicious, he must be satisfied that the conduct of the defendant arose from *personal* malice—from a real design to injure the plaintiff, and that it was in fact a wilful and malicious grievance, as distinguished from the meaning of the word malice as employed in an action for libel, where the unauthorized publication of calumnious matter affecting the character of another constitutes malice in law sufficient to justify an averment of malice in the declaration : (see Gray on Costs, 119.)

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### ERROR.

*Question.*—By the Common Law Procedure Act, 1854, in what cases are new powers given for obtaining the opinion of a court of error ?

*Answer.*—By sect. 32 of the 17 & 18 Vict. c. 125, error may now be brought upon a judgment upon a special case, in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary. Before this act the judgment of the court upon a special case, unlike that upon a special verdict, could not have been taken to a court of error. Also an appeal lies to the Court of Error from the decision of the courts in granting or refusing applications for new trials in certain cases : (see *ante*, p. 73 ; Chit. Arch. 424, 9th edit.)

*Q.*—Within what time must error be brought to reverse a judgment, and what exceptions are there to the limit ?

*A.*—Error to reverse a judgment in any cause must be brought and prosecuted with effect within six years after such judgment signed or entered of record ; but if the person entitled to bring error be an infant, *feme covert*, *non compos mentis*, or beyond the seas, then six years are allowed for such person to bring error after such disability has ceased : (see 15 & 16 Vict. c. 76, ss. 146, 147 ; Smith's Action at Law, 186, 5th edit. ; Chit. Arch. 507, 9th edit.)

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### EXECUTION.

*Question.*—How is a judgment enforced ?

*Answer.*—A judgment is enforced by execution : (Arch. New C. L. Pract. 228, 2nd edit. ; Smith's Action, 191, 5th edit.)

*Q.*—State the different processes of execution for the recovery of a judgment debt.



A.—A judgment debt is usually executed by writ of *feri facias*, *capias ad satisfaciendum*, or *elegit*. There are, indeed, two other modes of execution, one by *levari facias*, and the other by *extent*; but the former is altogether unusual, and the latter almost entirely appropriated to the Crown : (Smith's Action at Law, 191, 5th edit.)

Q.—Within what period must execution be sued out after judgment is signed?

A.—All writs of execution must be sued out within six years from the recovery of the judgment, and during the lives of the parties : (15 & 16 Vict. c. 76, s. 128; Smith's Action at Law, 207, 5th edit.)

Q.—State what kind of property may be taken under each of the different kinds of writs of execution.

A.—Under a writ of *feri facias* the goods and chattels of the party against whom execution is issued may be taken; under a writ of *elegit*, his goods and lands; and under a *capias ad satisfaciendum*, his person : (Arch. New C. L. Pract. 228, 2nd edit.; Smith's Action, 191, *et seq.* 5th edit.)

Q.—Is there any, and what, property that cannot be taken in execution?

A.—Yes; under a writ of *fi. fa.* the following goods cannot be taken in execution :—fixtures which are fixed in the freehold, and go to the heir and not to the executor, such as ranges, ovens, and the like. A mere equitable interest in a term for years cannot be sold by the sheriff. The goods of a stranger cannot be seized, although in the possession and apparent ownership of the defendant. In cases of an execution as to one of two partners, the sheriff may seize partnership property, but he can only sell that partner's undivided share in it; if he sell the shares of both, he must pay over to the other partner his share of the produce of the sale. If a writ of *elegit* is sued out, the oxen and beasts of the plough are excepted out of the debtor's goods and chattels : (see Arch. New C. L. Pract. 241 to 251, 261, 2nd edit. As to the goods of a bankrupt or insolvent, see *id.* pp. 249, 250.)

Q.—Can a plaintiff issue a *feri facias* after a *capias ad satisfaciendum* has been executed?

A.—Yes; for although the law considers the taking the defendant in execution a satisfaction of the judgment *as against him*; yet, though the defendant die in prison, or be discharged by privilege of Parliament, the plaintiff's remedy is not at an end, for stat. 2 Jac. 1, c. 13, gives execution after the privilege of Parliament has ceased; and stat. 21 Jac. 1, c. 24, gives execution against the defendant's goods and chattels after his decease; for which purpose a *fi. fa.* must be sued out : (See Smith's Action at Law, 197, 198, 5th edit.)

Q.—Can anything besides goods be levied or charged in execution under a recent act? and, if so, state what, and by what form of proceeding?

A.—Yes; by virtue of any writ of *feri facias* the sheriff or person having the execution of it may and shall seize and take any money or bank notes, cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money belonging to the person against whose effects such writ of *fi. fa.* shall be sued out; and he may deliver the *notes and money* so seized, or a sufficient part thereof, to the party suing out the writ; and may hold the cheques, &c., and other securities for money, as a security for the amount by such writ of *fi. fa.* directed

to be levied, or so much thereof as shall not have been otherwise levied and raised; and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if, and when, the time of payment shall have arrived; and payment to such sheriff or other officer shall discharge the party liable on the bill of exchange, &c., with or without suit: (see further, 1 & 2 Vict. c. 110, s. 12; Smith's Action at Law, 194, 5th edit.)

**Q.**—A. is indebted to B. 15*l.*; B. sues A., and recovers judgment for 15*l.* debt, and 25*l.* costs. Has B. his election to issue execution against the goods and effects, or against the body of A., or is he limited to one only of such remedies, and to which?

**A.**—On such a judgment, B. can only sue out execution against the goods and effects of A.; he cannot take the body of A. in execution. Before you can issue execution against the body of your debtor, the sum recovered must exceed 20*l.*, exclusive of costs: (see 7 & 8 Vict. c. 96, s. 57; Smith's Action at Law, 196, 5th edit.; Arch. New C. L. Pract. 266, 2nd edit.)

**Q.**—Is there any, and what, recent alteration in the plaintiff's power of taking a defendant in execution; and what remedy has the plaintiff when he cannot take the defendant in execution?

**A.**—By the 7 & 8 Vict. c. 96, s. 57, no person shall be taken or charged in execution upon any judgment obtained in any action for the recovery of any debt, wherein the sum recovered shall not exceed the sum of 20*l.*, exclusive of the costs recovered by the judgment. If after a *ca. sa.* has been sued out, and the sheriff return *non est inventus*, i.e., that the defendant is not found within his bailiwick, the plaintiff may, if he please, sue out an *exigi facias*, and proceed to *outlawry*, for outlawry on final judgment is not abolished: (see Smith's Action at Law, 197, 5th edit.)

**Q.**—Supposing a defendant to die while in custody in execution upon a judgment debt, what is the effect of the defendant's death? Is the debt gone, or does it continue?

**A.**—The debt is not gone; but the plaintiff may have execution against the deceased's goods and chattels, by stat. 21 Jac. 1, c. 24: (see Smith's Action at Law, 197, 5th edit.)

**Q.**—Suppose a plaintiff recover a verdict against two joint defendants, should he issue execution against each defendant for half, or if he issue execution against one for the whole, would the other be thereby exonerated entirely?

**A.**—The execution must pursue the judgment, and therefore should be issued against both. The mere levying an execution against one would not entirely exonerate the other: (see Chit. Arch. 554, 9th edit.; Arch. New C. L. Pract. 231, 2nd edit.)

**Q.**—Judgment against two defendants and one dies; what is necessary to enable the plaintiff to take out execution, and against whom will the execution issue?

**A.**—Where there are two defendants in a personal action, and one dies within six years after judgment, execution by *fieri facias* or *capias ad satisfaciendum* may be sued out, without any revival of the judgment. The execution may be sued out against the survivor upon suggesting the death upon the roll (which need not be done till the roll be carried in). If the plaintiff wish to have an *elegit* against the lands of

a deceased defendant as well as against the survivor, he may have a writ of revivor against such survivor, and the heir and terre tenants of the deceased, to have execution against the lands and goods of the former and the lands of the latter : (see Chit. Arch. 554, 1065, 1066, 9th edit.)

Q.—The venue in a cause being laid in the county of Surrey, and the plaintiff having obtained final judgment against the defendant, and being desirous to issue an execution against the defendant's effects in Norfolk, can he, or can he not, issue a *fieri facias* at once into the latter county, although the venue in the action is laid in the county of Surrey?

A.—Yes; for, by the 15 & 16 Vict. c. 76, writs of execution may issue at once into any county, without reference to the county in which the venue is laid : (sect. 121 ; Smith's Action at Law, 191, 5th edit.)

Q.—Supposing the person of a defendant to be in execution for a judgment debt, and that, with the plaintiff's consent, he is let out of prison on a promise to return into custody ; what is the effect of his being so let out of prison upon the debt, and may he be retaken ?

A.—By his being discharged with the plaintiff's consent, the debt is altogether extinguished, and he cannot afterwards be taken again in execution for the same debt, or have any writ of execution against his property ; even although he was discharged upon an express stipulation that the plaintiff should be at liberty to take him again : (see Arch. New C. L. Pract. 269, 2nd edit. ; Chit. Arch. 9th edit.)

Q.—Again, in the case of a joint debt due from A. and B., and both of them in custody in execution upon judgment recovered for such debt, and the plaintiff discharges A. out of prison ; does or does not the discharge of A. affect the debt as regards B., and how ?

A.—If the plaintiff discharge A., it will operate as a discharge of B. too, for the same debt : (Arch. *supra* ; Chit. Arch. *supra*.)

Q.—If the cause of action be matter of *contract* against several, may execution issue, and the damage be levied against either, and can he compel contribution ? and, if so, how ? and will it be the same in tort ?

A.—The execution must follow the judgment, and, therefore, should be issued against all : (Arch. New C. L. Pract. 231, 2nd edit.) ; but the execution may be levied against one in actions *ex contractu*, and he may compel the others to contribute by bringing an action against them (unless upon a contract made with the defendants as partners in trade : the remedy is then in equity) ; but in most cases of tort he cannot compel a contribution, and he is, in general, altogether without a remedy : (see Chit. Arch. 401, 7th edit.)

Q.—If a beneficed clergyman incur debts, is there any, and what, mode of obtaining payment out of the proceeds of the living ?

A.—If a beneficed clergyman incur a debt, you may bring an action against him, the proceedings thereon, to judgment inclusive, being the same as in ordinary cases. If on suing out a *fi. fa.* the sheriff returns that he is a beneficed clerk, and has no lay fee in his county, a writ, called a *fieri facias de bonis ecclesiasticis*, may be issued to the bishop of the diocese, whose duty thereupon is to appoint sequestrators, who take the tithes and other profits of the benefice towards satisfaction of the execution creditor's demand : (see Arch. New C. L. Pract. 328, 2nd edit. ; Smith's Action at Law, 196, 5th edit.)

Q.—What is a sequestration, and to what species of property does it apply ?

A.—A sequestration, in its most ordinary sense, signifies a kind of execution for a debt, and is most frequently used against a beneficed clerk or clergyman, in the manner above stated: (see *Holth. Law Dict.* 2nd edit.)

Q.—What property may be seized under an *elegit*?

A.—In the first place, the sheriff is to deliver to the execution creditor all the goods and chattels of the debtor (except his oxen and beasts of the plough), at an appraised price or value, and, if there be not enough to satisfy the judgment, the party's lands are to be extended. Formerly only a moiety of the freehold lands could have been extended, and not any of the copyholds; but by statute 1 & 2 Vict. c. 110, s. 11, the sheriff or other officer executing any writ of *elegit*, or any precept in pursuance thereof, may make and deliver execution unto the party suing out the writ all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up judgment, or at any time afterwards, or over which such person shall, at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit: (see further, 1 & 2 Vict. c. 110, s. 11; *Arch. New C. L. Pract.* 261, 2nd edit.; *Smith's Action at Law*, 200, 5th edit.; *Chit. Arch.* 9th edit.)

Q.—What are the disabilities of a defendant under outlawry, and how must he regain his former rights?

A.—Outlawry is, as its name imports, the putting of a man out of the law. An outlaw can have no rights against his fellow subjects; he can maintain no action against any one; he cannot even recover his costs against a plaintiff who sues him in a groundless action, and is nonsuited. His property is all forfeited to the Crown. His liberty is taken from him as soon as he can be found in England. In short, nothing is left him but his life and limbs, and even these were not safe at the common law; for, previous to the reign of Edward the First, he was thought to have *caput lupinum*: (*Smith's Action at Law*, 65, 5th edit.) A defendant under outlawry regains his former rights by a reversal of the outlawry. This may be done either upon motion to the court, or by writ of error: (*Arch. New C. L. Pract.* 273, 2nd edit.; *Harding v. Homer*, 27 L. T. Rep. 109.)

Q.—Where it is desired to charge in execution a person already in the Queen's prison, which is now the proper course to be pursued so to charge a person in execution?

A.—A person already in the Queen's prison may now be charged in execution by a judge's order made upon affidavit that judgment has been signed and is not satisfied; and the service of such order upon the keeper of the prison for the time being has the effect of a detainer; a writ of *habeas corpus ad satisfaciendum* being no longer necessary for such a purpose: (15 & 16 Vict. c. 76, s. 127.)

Q.—If a sheriff remove goods seized by him under an execution against the effects of a tenant after notice that a year's rent is due to the landlord, without provision being made for payment of the rent; has the landlord any, and what, remedy against the sheriff?

A.—Yes; an application may be made to the court; or an action may be brought against the sheriff for so removing the goods seized in execu-

tion from the premises, without satisfying the landlord for a year's rent, after notice of its being due, under 8 Anne, c. 14. The statute requires the payment of the rent before the goods are removed from the premises ; and if, therefore, they be sold and removed, the sheriff will be liable for the whole amount of the rent due, although the goods may have been sold for less : (see Arch. New C. L. Pract. 252, 253, 2nd edit. ; Smith's Action, 193, 5th edit.)

**Q.**—If a debtor in execution escape from the custody of the sheriff, or other person having the safe custody of such debtor, what remedy has the creditor ?

**A.**—The creditor may bring an action on the case (not debt) against the sheriff. He may also proceed against the sheriff by attachment, which will only be stayed by the sheriff's paying the damage sustained by the creditor. The creditor may also sue out another *ca. sa.*, or bring an action on the judgment : (see Arch. New C. L. Pract. 270, 2nd edit. ; Smith's Action at Law, 199, 5th edit.)

## HABEAS CORPUS, OR STATUTES SECURING PERSONAL LIBERTY OF SUBJECTS.

**Question.**—State a few of the acts of Parliament securing the personal liberty of the subject ; and state in whose reigns they were passed.

**Answer.**—They are the following : the 3 Car. I., commonly called the Petition of Right ; the 16 Car. I., c. 16, asserting the right to, rather than giving, a *habeas corpus* ; and the act commonly called the Habeas Corpus Act, 31 Car. 2, c. 2 (amended by 56 Geo. 3, c. 100), regulating the mode, &c., of obtaining a *habeas corpus* : (see 1 Steph. Com. 140, 141, 3rd edit.)

**Q.**—What is the personal security acquired by the Habeas Corpus Act ; and what is the mode of obtaining a *habeas corpus* ?

**A.**—The personal security acquired by the Habeas Corpus Act is the prompt issue and return to *habeas corpus*, so that a person unjustly detained in prison may obtain his release. A writ of *habeas corpus* is obtained from the court in term, and from a judge at chambers in vacation : (see 3 Steph. Com. 710, *et seq.* 3rd edit. ; and see hereon *Ex parte Cobbett*, 30 L. T. Rep. 322.)

## AFFIDAVIT.

**Question.**—Before and after an action brought, how must the affidavits be entitled ?

**Answer.**—Before action brought it is sufficient to entitle the affidavit with the name of court in which you intend to proceed. After action

brought the affidavit must be entitled in the cause, *i. e.*, the Christian and surname of the plaintiff and defendant as well as the court : (Smith's Action at Law, 29, 5th edit.)

Q.—May an affidavit in a cause to be used in courts or before a judge (not being an affidavit to hold to bail) be sworn before the attorney in the cause, or his clerk, each of them being a commissioner authorized to take affidavits in the country ?

A.—By Rule Gen. 132, no affidavit of the service of process shall be deemed sufficient, if sworn before the plaintiff's own attorney or his clerk. To come within this rule, however, the commissioner must be not merely the law adviser of the party generally, but his attorney in that particular business : (Arch. New C. L. Pract. 609, 2nd edit.)

Q.—Objection was made to an affidavit that the deponent had not inserted any description of himself or his residence ; was this a good objection ?

A.—Yes ; for by Rule Gen. 138, the addition and true place of abode of every person making an affidavit must be inserted therein.

Q.—What are the requisites to the form of the jurat to an affidavit ?

A.—The jurat consists of a short statement when, where, and before whom the affidavit was sworn. And if there be any interlineation or erasure in the jurat, the affidavit cannot be read or made use of : (Rule Gen. 140.) In such a case, the jurat must be struck out and re-written, and the affidavit re-sworn : (Arch. New C. L. Pract. 610, 2nd edit.)

Q.—What is the form of the jurat when there is more than one deponent ?

A.—Where there are several deponents, their names must appear severally in the jurat, in this way : "The above-named deponents, A., B., and C., were severally sworn," &c. (Rule Gen. 139.)

Q.—Before whom are affidavits sworn in the country ?

A.—They are sworn before commissioners appointed for that purpose : (Arch. New C. L. Pract. 598, 607, 2nd edit.)

Q.—What is required to be sworn in an affidavit of "merits?"

A.—An affidavit of merits must state that the defendant has "a good defence to the action upon the merits ;" saying that he "is advised and believes" that he has a good defence on the merits, is not sufficient : (see Arch. New C. L. Pract. 606, 2nd edit. ; Chit. Arch. 9th edit.)

Q.—If there be two or more deponents to an affidavit, and the names of all be not mentioned in the jurat, or if the jurat omit to state the day on which the affidavit was sworn, what will be the consequence ?

A.—If there be two or more deponents, the names of all must be stated in the jurat, or it cannot be used. So the jurat must state the day on which the affidavit is sworn, otherwise it shall not be read : (see Arch. New C. L. Pract. 610, 2nd edit.)

Q.—Should an affidavit in support of an order to hold to bail, be entitled in the cause, and in the court in which the action is to be brought ?

A.—If the affidavit be sworn before the issuing of the writ of summons, it should not be entitled in any cause : (*Hargrave v. Hayes*, 5 E. & B. 272) ; but it should be entitled in the court in which the action is intended to be brought. But if there be a cause in court, the affidavit

should be entitled in it as well as in the court : (see *Smith's Action at Law*, 29, 5th edit. ; *Arch. New C. L. Pract.* 599, 2nd edit. ; *Pat. & Mac. C. L. Pr.* 1119.) An affidavit, however, if sworn before a judge, may be used in the court of which he is a judge, though not entitled with the name of that court : (*Rule Gen.* 144.)

*Q.*—Have any, and what, alterations been recently made as to the form of affidavits ; and, if the alteration is not adopted, in what way will the costs be affected ?

*A.*—Affidavits to be used in any cause or civil proceeding in any of the superior courts of common law are now to be drawn up in the first person, and divided into paragraphs, and every paragraph is to be numbered consecutively, and, as nearly as may be, to be confined to a distinct portion of the subject. No costs are to be allowed for any affidavit, or part of an affidavit, substantially departing from this rule : (*Rule 2, Michaelmas Vacation, 1854 ; Pat. and Mac. C. L. Pract.* 1119.)

## WARRANT OF ATTORNEY AND COGNOVIT.

*Question.*—What is the difference between a warrant of attorney and a *cognovit* ?

*Answer.*—A warrant of attorney is a written authority to one or more attorneys to appear for the party executing it in some court, and there to receive a declaration at the suit of the party to whom the warrant is given, and to confess the same, or to suffer judgment to pass against him by *nil dicit*, or otherwise. It also contains an authority to the attorney to execute a release of errors ; and on this account it is that a warrant of attorney must be under seal, because an authority or power to execute a deed, such as a release, must be by deed. But a warrant of attorney to confess judgment merely, need not be by deed : (*Arch. New C. L. Pract.* 529, 2nd edit.) A *cognovit* is a confession of an action in writing, with or without terms or conditions annexed to it. The action of course must be commenced before a *cognovit* can be given, but it may be given before declaration, or at any time after process is sued out : (*Id.* 528 ; *Chit. Arch.* 9th edit.)

*Q.*—What proceedings are necessary to render a *cognovit* or a warrant of attorney a valid instrument ?

*A.*—It must be executed in the presence of an attorney of one of the superior courts, on behalf of the person executing it, expressly named by him, and attending at his request to inform him of the nature and effect of such *cognovit* or warrant of attorney, before the same is executed ; which attorney must subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney : (1 & 2 Vict. c. 110, s. 9.) So every *cognovit* or warrant of attorney in a personal action, in case the action be in the Court of Queen's Bench, or

a true copy of such *cognovit* or warrant of attorney, if the action be in any other court, shall, together with an affidavit of the time of the execution thereof, be filed with the officer acting as clerk of dockets and judgments in the said Court of Queen's Bench, within twenty-one days next after the execution thereof, to render it or any judgment or execution thereupon valid as against the assignees of the defendant if he should become bankrupt; and if the *cognovit* or warrant of attorney is subject to a defeazance, the defeazance must be written on the same paper or parchment on which the *cognovit* is written, before the same or a copy thereof is filed, otherwise such *cognovit* or warrant of attorney shall be null and void to all intents and purposes: (see 3 Geo. 4, c. 39, and 12 & 13 Vict. c. 106, s. 136; Arch. New C. L. Pract. 528, *et seq.* 2nd edit.; Pat. & Mac. C. L. Pract. 1022.)

Q.—What should be done to insure the validity of a warrant of attorney in case of the party to it becoming bankrupt?

A.—It must be filed with an affidavit of its execution as detailed in the last preceding answer.

Q.—Can an infant execute a *cognovit*?

A.—No; if a *cognovit* have been given by an infant, the court will order it to be given up, or taken off the file to be cancelled: (Arch. New C. L. Pract. 543, 2nd edit.)

Q.—Is a joint warrant of attorney given by an infant and another binding on both parties?

A.—No; the court will set aside the warrant of attorney or judgment as to the infant, but will allow it to be enforced as to the other defendant. The court will, however, require the infancy to be made out by clear evidence, not being the affidavit of the defendant himself: (Arch. New C. L. Pract. 546, 2nd edit.)

Q.—What is the advantage of filing a *cognovit* "under the statute," and within what period must it be so filed?

A.—The advantage obtained by filing a *cognovit* under the statute is, that if the defendant afterwards becomes bankrupt, it or any judgment or execution thereupon will be valid against his assignees. This must be done within twenty-one days after the execution of the *cognovit*: (see *supra*; Arch. New C. L. Pract. 534, 2nd edit.)

Q.—When a party gives a warrant of attorney, by whom must it be attested, and what must the attestation state?

A.—(See *supra* and the next succeeding answer.)

Q.—What are the principal requisitions of the statute 1 & 2 Vict. c. 110, relating to warrants of attorney, a strict compliance with which is required by the courts?

A.—The principal requisitions under the statute, and which the courts require to be strictly complied with, are as follow:—1. There must be present an attorney of one of the superior courts on behalf of the defendant.

2. Such attorney must be expressly named by the defendant, and must attend at his request. This means merely that the attorney shall be employed by the defendant of his own voluntary act; it is not necessary that the attorney be first named by him; if the name of an attorney be suggested to the defendant by the plaintiff or his attorney, and he



adopt the suggestion, and employ the attorney for the purpose, this, in the absence of fraud, will be sufficient.

3. The attorney's presence is required to inform the defendant of the nature and effect of the warrant of attorney. It is not necessary that he should read it to him. And even if (without collusion) he do not, in fact, inform the defendant of the nature and effect of the instrument, that will not affect its validity.

4. The attorney must subscribe his name as a witness to the due execution of the instrument, and must in the attestation declare himself to be the attorney for the person executing the warrant, and state that he subscribes as such attorney: (Arch. New C. L. Pract. 531, 2nd edit.; and see Chit. Arch. 891, *et seq.* 9th edit.)

Q.—What is required to enter judgment on a warrant of attorney above one and under ten years, and what above ten years?

A.—By Rule Gen. 26, leave to enter up judgment on a warrant of attorney, above one and under ten years old, is to be obtained by order of a judge made *ex parte*; and if ten years old, or more, upon a summons to show cause. In one case the court refused to grant more than a rule to show cause, under the peculiar circumstances of the case, although the warrant was not ten years old. The parties, however, may dispense with the necessity of applying thus to the court, by a stipulation to that effect in the defeazance: (Arch. New C. L. Pract. 539, 2nd edit.)

Q.—A warrant of attorney, dated 21st of July, authorized judgment to be entered up, "as of Trinity Term last, Michaelmas Term next, or of any subsequent term." Judgment was signed in August; was this judgment regular?

A.—No; the judgment not being entered up in a term, as authorized by the warrant. The judgment must be signed in strict pursuance of the warrant: (see Arch. New C. L. Pract. 542, 2nd edit.; Chit. Arch. *sup.*)

Q.—When a warrant of attorney is executed by a party in custody, is anything necessary to be done beyond what would be necessary if he was not in custody?

A.—Formerly a warrant of attorney, or *cognovit*, given by a prisoner in custody on mesne process, must have been executed in the presence of his attorney, and attested by him. This rule of practice, however, is now no longer confined to the case of a prisoner, but is made general by stat. 1 & 2 Vict. c. 110, s. 9; and which has been before considered: (see Arch. New C. L. Pract. 531, 2nd edit.)

Q.—A warrant of attorney to confess a judgment for 1000*l.* having been given by two parties jointly (and not jointly and severally), one of them dies before judgment is entered up; can the party to whom the warrant of attorney was given enter up judgment against the survivor?

A.—No; the court will not allow judgment to be entered up against survivor, under any circumstances: (Arch. New C. L. Pract. 539, 2nd edit.)

Q.—Where a judge's order is made by consent, given by any trader defendant in any personal action, authorizing judgment to be entered up, and execution issued, what is necessary to be done with such order, so as to prevent the same, and the proceedings under it, from becoming null and void?

A.—In order to render the order valid as against the assignees of the defendant, if he become bankrupt, a true copy of it, together with an

affidavit of the time of such consent being given, and a description of the residence and occupation of the defendant, must be filed with the officer acting as clerk of the dockets and judgments of the Court of Queen's Bench, within twenty-one days after the making of such order, in the same manner as in the case of a warrant of attorney or *cognovit*: (12 & 13 Vict. c. 106, s. 137; Arch. New C. L. Pract. 547, 2nd edit.)

Q.—What, if anything, is necessary to be done to make a bill of sale of chattels good, and under what law or regulation? (a)

A.—To make a bill of sale of chattels good, it must be registered within twenty-one days after the making or giving of the bill with the officer acting as clerk of dockets and judgments in the Court of Queen's Bench, in like manner as a warrant of attorney in any personal action is required to be filed. This is required by stat. 17 & 18 Vict. c. 36: (see Arch. New C. L. Pract. 246, 2nd edit.; Chit. Arch. 616, *et seq.* 9th edit.)

1 A. L.

## EJECTMENT.

Question.—What is an action of ejectment, and in what cases is ejectment usually brought?

Answer.—This is an action by which the possession of land is recovered, and, prior to the Common Law Procedure Act, 1852, it was altogether an anomalous and fictitious proceeding. It originated as far back as the reign of Edward III., in consequence of the disfavour into which the dilatory and intricate real and mixed actions fell. It was then a species of personal action by the tenant for a term of years, claiming damages for a forcible ouster from the land demised. The courts in the latter end of the fifteenth century having determined that the plaintiff was also entitled to the recovery of the land, it became the ordinary mode of enforcing a right of entry, and was gradually treated as a mixed action. By various fictions this remedial proceeding was extended, until it became, and is now, the only mode of recovering land; it is wholly remodelled by the 15 & 16 Vict. c. 76: (Smith's Action at Law, 233, 5th edit.; Pat. & Mac. C. L. Pr. 932.) Whether ejectment is, by the above act, a *real* action is by no means easy to say. It seems to fall under the definition of a real action, because it now claims the specific recovery of land without damages. But in its incidents it has no connection whatever with the antiquated remedies to which that appellation commonly belongs: (see 3 Steph. Com. 451 *n.*, 3rd edit.) And for these reasons it was not mentioned as a real action when enumerating and defining that class of actions: (see *ante*, p. 3.)

Q.—What is the first proceeding in an action of ejectment; and how, and on whom, and where, is it to be served?

**A.**—Instead of the former anomalous and fictitious mode of proceeding in ejectment (*a*) a writ is now issued, directed to the persons in possession by name, and to all persons entitled to defend the possession of the property claimed, which property shall be described in the writ with reasonable certainty: (see 15 and 16 Vict. c. 76, s. 168.) The writ shall state the names of all the parties in whom the title is alleged to be, and command the persons to whom it is directed to appear within sixteen days after service thereof, in the court from which it is issued, to defend the possession of the property sued for, or so much thereof as they may think fit; and it shall contain a notice that, in default of appearance, they will be turned out of possession. And the writ shall bear teste on the day it is issued, and shall be in force for three months: (*Id.* s. 169.) The writ is to be served in the same manner as an ejectment has heretofore been served, or in such a manner as the court, or a judge, shall order; and in case of vacant possession, by posting a copy thereof upon the door of the dwelling-house or other conspicuous part of the property: (*Id.* s. 170.) It should be served either upon the tenant in possession, or his wife: this is the only regular mode of service. On the tenant himself it may be served anywhere, even abroad. Upon the wife it may be served either upon the premises for which the action is brought, or at the husband's dwelling-house, or at any other place, if it appear from the affidavit that the wife was living with her husband at the time. So service upon a servant or child, or other person upon the premises or elsewhere, if the tenant acknowledged he had received the declaration, was deemed equivalent to personal service: (see further Arch. New C. L. Pract. 279, *et seq.* 2nd edit.; Pat. & Mac. C. L. Pract. 935, &c.; Smith's Action at Law, 237, 5th edit.)

**Q.**—How many days has a defendant to appear in actions of ejectment?

**A.**—In ejectment a defendant has sixteen days after service of the writ to appear and defend the possession of the property sued for: (15 & 16 Vict. c. 76; Pat. & Mac. New C. L. Pract. 939; Smith, *sup.*)

**Q.**—Within what period can an action of ejectment be brought?

**A.**—Within twenty years next after the time at which the right to bring such action shall have first accrued to some person through whom the person bringing the action claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to bring such action shall have first accrued to the person bringing the same: (3 & 4 Will. 4, c. 27, s. 2.; Browell's Real Pro. Stats. 21, &c.)

**Q.**—Is an equitable title sufficient to found this action?

**A.**—An equitable title will not be sufficient to entitle the party to recover, for it is a fundamental rule that courts of law take cognizance of legal rights only.

**Q.**—Can process in ejectment be served on the wife of a tenant, and under what circumstances?

**A.**—Process in ejectment may be served upon the wife, either upon the premises for which the action is brought, or at the husband's dwelling-house or place of business, or at any other place, if it appear from

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(a) As to the mode of proceeding prior to the Procedure Act, 1852, the student is referred to Smith's Action at Law, p. 233, *et seq.* 5th edit., or to any of the old text books.

the affidavit that the wife was living with her husband at the time. And a service upon the wife upon the premises will be good, even although the husband have left the kingdom and settled abroad. The person serving it should deliver it personally to the wife: (see *supra*, Arch. New C. L. Pract. 279, 2nd edit. ; Pat. & Mac. C. L. Pract. 936.)

*Q.*—What are the steps to be taken in an action of ejectment, before the cause is at issue?

*A.*—By the Procedure Act, 1852, it is enacted, that if an appearance be entered, an issue is at once to be made up, without any pleadings, by the claimants or their attorney, setting forth the writ and stating the fact of the appearance, with its date, and the notice limiting the defence, if any, of each of the persons appearing, and directing the sheriff to summon a jury to try the issue: (see s. 178; Smith's Action at Law, 238, 5th edit. ; Chit. Arch. 974, 9th edit.)

*Q.*—In ejectment against a tenant in possession, what is required to enable a landlord to come in and defend?

*A.*—The landlord must make an affidavit showing that he is in possession of the land by his tenant, and apply to a judge for leave to appear and defend. And he must, in his appearance, state that he appears as landlord: (15 & 16 Vict. c. 76, s. 172, 173; Smith's Action, 237, 5th edit.)

*Q.*—In an action of ejectment where a party wishes to defend as landlord, or devisee, or mortgagee, what steps should he take to be let in and defend?

*A.*—He must take the steps detailed in the preceding answer. For the 172nd sect. of 15 & 16 Vict. c. 76, empowers any other person not named in the writ to come in and defend, on obtaining leave and making the necessary affidavit. It has been decided that where a person is neither named in the writ, nor in possession of the property, either by himself or his tenant, he cannot obtain leave to come in and defend the action: (*Thompson v Tomkinson*, 11 Exch. 442; see also Law Times, vol. 29, p. 7.) But he may move for a new trial.

*Q.*—In an action of ejectment the defendant obtains a verdict. Is the plaintiff's claim to the premises sought to be recovered barred by such verdict?

*A.*—Yes; a verdict for the defendant has the effect of for ever barring and determining the plaintiff's right of action: (Smith's Action at Law, 138, 5th edit.) But he may move for a new trial.

*Q.*—When the tenant cannot be met with, may the proceedings in ejectment be served on any one of the family, without anything further being done?

*A.*—Yes; as upon the wife, if shown by the affidavit of service that she was living with her husband at the time. And service upon a child or servant is deemed equivalent to personal service upon the tenant, if he afterwards acknowledges he has received the writ. If the service be merely upon the son or servant, &c., of the tenant, yet if, from circumstances stated in the affidavit of service, it appears that the tenant kept out of the way for the purpose of avoiding personal service, and the deponent add his belief that he did so, the court will first grant a rule to show cause why the service should not be deemed good service, and will direct the manner in which the rule shall be served: (Arch. New C. L. Pract. 282, 2nd edit. ; Pat. and Mac. C. L. Pr. 936.) It should be

remembered that the writ is now served as the declaration was formerly served, or as the court or judge may order: (15 & 16 Vict. c. 76, s. 170.)

Q.—Can the unsuccessful party in ejectment retry the same question as often as he pleases without leave of the court?

A. ~~By~~ By the 17 & 18 Vict. c. 125, s. 93, it is provided, that if any person shall bring an action of ejectment, after a prior action of ejectment for the same premises has been unsuccessfully brought by such person, or by any person through whom he claims, against the same defendant, or any person through whom he defends, and whether it has been disposed of by discontinuance, or nonsuit, or judgment for the defendant, the court, or a judge, may, on the application of the defendant at any time after appearance, order the plaintiff to give the defendant security for payment of his costs, and stay all further proceedings until the security be given: (Smith's Action at Law, 243, 5th edit.)

Q.—When a plaintiff has recovered verdict in ejectment, how does he recover possession?

A.—Upon a finding for the claimant, judgment may be signed, and execution issue for recovery of possession of the property, or such part thereof as the jury shall find the claimant entitled to, and for costs, within such time, not exceeding the fifth day in term, after the verdict, as the court, or judge, before whom the cause is tried, shall order; and if no such order be made, then on the fifth day in term after the verdict, or within fourteen days after such verdict, whichever shall first happen: (15 & 16 Vict. c. 76, s. 184.) The property is recovered, generally, by writ of possession, and the costs by any of the ordinary writs of execution, as a *fi. fa.*; but by the 187th sect. there may be either one writ or separate writs of execution for the recovery of possession and for costs: (see Arch. New C. L. Pract. 291, 2nd edit.)

Q.—At whose suit must an action for *mesne* profits be brought, and against whom?

A.—After judgment in ejectment the plaintiff may proceed by action of trespass against the defendant for the recovery of *mesne* profits: (Pat. & Mac. C. L. Pract. 975.) By sect. 208 of 15 & 16 Vict. c. 76, after enacting that error may be brought upon any judgment in ejectment, &c., it further enacts, that it shall be lawful for the court wherein execution ought to be granted upon affirmation (of the judgment), or on discontinuance, upon application of the claimant, to issue a writ to inquire as well of the *mesne* profits, as of the damage by any waste committed after the first judgment in ejectment, which writ may be tested on the day it shall issue, and be returnable immediately after the execution thereof; and upon the return thereof judgment shall be given, and execution awarded, for such *mesne* profits and damages, and also for costs of suit. And, by sect. 214, it enacts, that wherever it shall appear on the trial of any ejectment, at the suit of a landlord against a tenant, that such tenant, or his attorney, hath been served with due notice of trial, the judge before whom such cause shall come on to be tried shall, whether the defendant appears upon such trial or not, permit the claimant on the trial, after proof of his right to recover possession of the whole or any part of the premises mentioned in the writ in ejectment, to go into evidence of the *mesne* profits thereof, which shall or might have accrued from the day

of the expiration of the tenant's interest in the same down to the time of the verdict, or to some preceding day, to be specially mentioned therein; and the jury, on the trial, finding for the claimant, shall, in such case, give their verdict upon the whole matter, both as to the recovery of the premises, and also the amount of damages to be paid for mesne profits: and this does not prevent the landlord from bringing an action for the mesne profits accruing from the verdict, or the day specified therein, down to the day of delivery of possession of the premises recovered. This action is brought against the person actually withholding possession: (see Pat. & Mac. C. L. Pract. 975; Arch. New C. L. Pract. 292, 296, 2nd edit.; Chit. Arch. 109, &c., 9th edit.)

### ARBITRATION.

*Question.*—What is the usual mode of submitting a question to arbitration?

*Answer.*—Either by agreement of reference, or by an order of Nisi Prius; or, at all events, this was formerly the case. But now, by the Procedure Act, 1854, sects. 3 to 16, powers are given to the court or a judge, after action brought, to compel the parties to refer to arbitration, where the matter in dispute consists wholly, or in part, of matters of account, which cannot conveniently be tried in the ordinary way, or where the parties have commenced the action, contrary to an agreement that any existing or future differences should be referred to arbitration, and to give direction as to costs. The order of the court or judge, or the award of the arbitrator, is enforceable by the same process as the finding of a jury upon the matter referred. Prior to this act there was no method, except by consent of both parties, of obtaining a decision by arbitration: (see further Smith's Action at Law, 245, *et seq.* 5th edit.)

*Q.*—A. brings an action against B. for recovery of a disputed debt; after action brought, the cause is referred to an arbitrator by a judge's order; before award made, A. wishes to revoke the arbitrator's authority. Is he at liberty to do so of his own will, or must he have any and what leave?

*A.*—A. cannot revoke the arbitrator's authority without first obtaining leave of the court or a judge; and the arbitrator is to proceed with the reference, and make his award, notwithstanding any revocation that may be made without leave: (see 3 & 4 Will. 4, c. 42, s. 39; Arch. New C. L. Pract. 407, 2nd edit.; Chit. Arch. 1544, 9th edit.)

*Q.*—If you are dissatisfied with an award, how must you apply to set it aside, and within what time?

*A.*—The mode in which these applications are made is by motion to the court for a rule *nisi*. And by Rule Gen. 169, in the rule *nisi* must be stated all the objections to the award, intended to be insisted upon at the time of making such rule absolute. And this rule extends also to cases where merely a certificate, and not an award, has been given by the arbitrator. But, before moving to set aside an award, the order or agreement of submission must be made a rule of court.

By stat. 17 & 18 Vict. c. 125, s. 9, all applications to set aside any award, made on a compulsory reference under this act, shall and may be made within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term; and if no such application be made, or if no rule be granted thereon, or if granted, and afterwards discharged, such award shall be final between the parties.

In all cases where the submission has been made a rule of court under stat. 9 & 10 Will. 3, c. 15, application must be made before the last day of the term next after the award, or umpirage thereon, shall be made and published, to set it aside for corruption of the arbitrator, or for any other cause.

When the submission is by rule of court or judge's order, although it does not come within the above statute, yet, in analogy to the statute, the court require the motion to set aside an award in such a case to be made before the end of the term next after publishing the award. But the court are not bound by the statute in these cases.

If the submission be by order of Nisi Prius, and the reference be of the cause alone, and a verdict be taken, a party intending to move to set aside the award or certificate of the arbitrator must do so within the time allowed for moving for a new trial, unless a sufficient reason for the delay be shown: (Arch. New C. L. Pract. 434—436, 2nd edit.; Chit. Arch. 1579, *et seq.* 9th edit.)

**Q.**—State the usual grounds of setting aside an award.

**A.**—The following are the usual grounds of setting aside an award:—Misconduct of the arbitrator. The award not pursuing the submission. That the arbitrator has exceeded his authority. That the arbitrator has not awarded on all the matters referred to him. That the award is uncertain. That it is inconsistent. That it is not final. By stat. 17 & 18 Vict. c. 125, s. 8, power is given to the court or a judge to remit matters referred, or any of them, to the consideration of the arbitrator, in references under this act. And it has been held that this section extends to references by submission, if made a rule of court: (*Morris v. Morris*, 27 L. T. Rep. 103.)

**Q.**—Has an arbitrator the same power to certify as to costs which the judge would have had, if the cause had been tried before him at Nisi Prius?

**A.**—Not unless a power be given him so to do by the submission or order of reference: (see Gray on Costs, 409, 410, 429; L. T. vol. 27, p. 103.; Chit. Arch. 1534, 1573, 9th edit.)

**Q.**—What are the means of enforcing an award, where there is no cause pending, and the submission contains no clause to make it a rule of court?

**A.**—In such a case, the mode of enforcing the award is by action of debt on the bond of submission; or by action of covenant, if the submission be by any other deed; or by assumpsit, if the submission be by agreement, not under seal, or by parol; or by debt on the award, if the award be for payment of money only: (Arch. New C. L. Pract. 425, 2nd edit.) But by the 17 & 18 Vict. c. 125, it is provided, that, for the future, every agreement or submission to arbitration by consent, whether by deed or instrument in writing, not under seal, may be made a rule of court, on the application of any party thereto, unless the agreement or submission shows a contrary intention: (sect. 17.)

*Q.*—How would you proceed to enforce an award under submission to arbitration, after it is made a rule of court?

*A.*—By attachment. But the award must contain an order by the arbitrator to pay the money, or do the act awarded; for otherwise the not doing it will be no breach of the rule, and the court cannot grant an attachment; or where the award is only for payment of money or costs, the party may enforce it by a writ of execution: (see Arch. New C. L. Pract. 425 to 427, 432, 2nd edit.; and as to enforcing awards generally, see Chit. Arch. 1589, *et seq.* 9th edit.)

## DISTRESS.

*Question.*—For what are distresses usually taken?

*Answer.*—1. The most usual injury for which a distress may be taken, is that of non-payment of rent. And it is now a universal principle that a distress may be taken for any kind of rent in arrear, the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it. 2. For neglecting to do suit to the lord's court. 3. For amercements in a court leet, but not for amercements in a court baron, without special prescription to warrant it. 4. Where a man finds beasts of a stranger wandering in his grounds, *damage feasant*. 5. Lastly, for several duties and penalties inflicted by special acts of Parliament, as for assessments made by commissioners of sewers, or for the relief of the poor, for particulars of which the reader must refer to the statutes themselves. But rent cannot be distrained for, unless the amount be certain: (see 3 Steph. Com. 342, 343, 3rd edit.)

*Q.*—What may be distrained, and what things are privileged from distress, for rent?

*A.*—It is a general rule that all chattels, personal, found upon the premises, as well the goods of strangers as of the tenant, are liable to be distrained, unless particularly protected or exempted. And the following things are privileged or protected:—1. Animals *feræ naturæ*. 2. Whatever is in the personal use or occupation of any man, is, for the time, privileged from distress, in order to prevent the danger which otherwise might arise of a breach of the peace; as an axe with which a man is cutting wood, or a horse while a man is riding him; but horses drawing a cart may (cart and all) be distrained for rent arrear. 3. Things delivered to a person exercising a public trade, to be carried, wrought, or managed in the way of his trade; as cloth at a tailor's. 4. Things in the custody of the law, such as property already taken *damage feasant*, or in execution. 5. Generally money, but not if in a *sealed bag*. 6. Everything which cannot be returned in as good a condition as when distrained; as milk, fruit, and the like. But corn in sheaves or cocks, or loose in the straw, or hay in barns or ricks, or otherwise, may now be distrained by stat. 2 Will. & M. c. 5. 7. Things fixed to the freehold; as caldrons, windows, doors, and chimney-pieces. So corn growing could not be distrained till 11 Geo. 2, c. 19. Besides the preceding articles which are absolutely privileged, the following are



privileged, *sub modo*: beasts of the plough and sheep, and instruments of husbandry; and the instruments of a man's trade or profession, as the axe of a carpenter, the books of a scholar, and the like; all which are exempt, provided there be other sufficient distress on the premises: (see 3 Steph. Com. 344 to 347, 3rd edit.; Arch. Land. & T. 111, *et seq.* 2nd edit.)

Q.—How are distresses made; and how disposed of?

A.—In the first place, all distresses must be made by *day*, unless in the case of *damage feasant*, an exception being there allowed, lest the beasts should escape before being taken. And, in general, the distress must be on the premises. The distress is made either by the landlord or his bailiff, entering on the demised premises; formerly, during the continuance of the lease, but now, if the tenant hold over, the landlord may distrain within six months after the determination of the lease; provided his own title or interest, as well as the tenant's possession, continue at the time of the distress. If the landlord does not find sufficient distress on the premises, formerly he could resort nowhere else; but now, by 9 Anne, c. 14, and 11 Geo. 2, c. 19, the landlord may distrain any goods of his tenant, carried off the premises fraudulently or clandestinely, wherever he finds them, within *thirty days* after, unless they have been *bonâ fide* sold for a valuable consideration. The whole amount should be distrained for at once, unless there is not sufficient distress on the premises. When the distress is taken, the things distrained must be impounded, which may be on the premises, it being shown to be a fit and convenient place: (11 Geo. 2, c. 19.) If the tenant or owner do not, within five days after the distress is taken, and notice in writing of the cause given to him, replevy the same, the distrainer may have the same appraised and sold: (see 3 Steph. Com. 348 to 352, 3rd edit.; Arch. Land. & T. 125, *et seq.* 2nd edit.)

Q.—Can an outer, or any, and what other, door be broken open, in order to make a distress?

A.—An outer door cannot be broken open for the purpose of making a distress. But when the party making the distress is in the house, an inner door may be broken open: (Arch. Land. & T. 125, 2nd edit.) And where goods have been fraudulently removed and locked up to prevent a distress, the landlord may, by the assistance of the peace officer of the parish, and oath having been made before a justice, in case it is a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein, break open, in the daytime, the place where the goods have been removed to: (11 Geo. 2, c. 19; Steph. Com. 349, 3rd edit.)

Q.—What do you understand by the expression “cattle *levant* and *couchant*?”

A.—The expression literally means, *rising up* and *lying down*, but it is chiefly used in respect to distresses. Thus, if lands were not sufficiently fenced, so as to keep out cattle, if the landlord or tenant is bound to do so, the landlord or tenant cannot distrain them till they have been *levant* and *couchant* on the lands; that is, have been long enough there to have lain down and risen up to feed, which, in general, is held to be one night at least: (see further 3 Steph. Com. 345, 3rd edit.)

Q.—In what cases may cattle be impounded; and, if impounded for

an excessive sum, what are the remedies, and against the party impounding, or against the pound keeper?

*A.*—As before stated, cattle may be impounded on a distress for rent arrear; so they may be impounded for a distress *damage feasant*, and this may be made (even in the night) by the owner of the land on which the damage is done, or by a commoner. The cattle must be taken while on the land, but it is not generally necessary that they should have been *levant* and *couchant*: (Co. Lit. 161; 3 Steph. Com. 143, 3rd edit.; Arch. Land. and T. 333, 2nd edit.) By the Statute of Marlebridge, the party making the excessive distress may be grievously amerced for the excess of such distress. Besides this amercement, an action on the case, founded on the above enactment, lies at the suit of the party grieved. And this is the proper remedy: (Arch. Land. & T. 296, 2nd edit.) The action must be brought against the impounder, and not against the pound keeper, for he is not liable, unless he has exceeded his duty, and assented to the trespass; for a pound keeper is bound to receive everything offered to his custody: (see Selw. N. P. 685, 11th edit.)

*Q.*—Can landlords distrain the property of a lodger or third person for rent due from their own tenants, and are there any exceptions? Suppose they are implements of trade, how then?

*A.*—It has already been stated, that all personal goods upon the premises may be distrained, except things fixed to the freehold, and other exempted articles (see *ante*, p. 104); and it will make no difference if they be the goods of a stranger: (Arch. Land. & T. 122, 2nd edit.) But the goods of a third person cannot be distrained if there be other sufficient distress, on the premises available: (*Keen v. Priest*, 32 L. T. Rep. 319.)

*Q.*—When a landlord distrains for rent, after what time can he proceed to sell the goods distrained?

*A.*—As before seen, by stat. 2 W. & M. c. 5, the party distraining shall not sell the goods within five days next after the distress taken, and notice of the cause of the distress given. The five days must be reckoned exclusive of the day of the distress and the day of sale. But the landlord is not bound to sell immediately on the expiration of the five days, but is allowed, by law, a reasonable time afterwards for the appraisalment and sale. Before the sale, the goods must be appraised by two sworn appraisers. The oath is administered by the constable of the hundred, parish, or place where the distress was taken. The five days are allowed for the tenant to replevy the goods: (Arch. Land. & T. 133, 2nd edit.; 3 Steph. Com. 352, 3rd edit.)

*Q.*—Is the summary remedy of a landlord for rent suspended, if he take a note, bill, or bond?

*A.*—No; for the rent is of a higher nature, and the acceptance of a security of an unequal degree is no extinguishment of the claim: but a judgment obtained upon a bond would be an extinguishment of it: (*Harris v. Shipway*, and *Ewer v. Lady Clifton*, Bull. N. P. 182.)

*Q.*—Where a landlord grants a mortgage, and afterwards lets the premises by lease, can the mortgagee distrain if the tenant have not attorned to him, or what remedy has he against the tenant; and would the remedy be the same if a lease of the premises had been granted before the mortgage; and if not, what would be the difference?

*A.*—If a lease is made by a mortgagor *after* the mortgage, the

mortgagee, although he may treat the lessee as a wrong-doer and bring ejectment, yet he cannot distrain or sue the lessee for the rent in arrear, for there is no relation of landlord and tenant between them; unless, indeed, they create a new tenancy, as by the tenant's agreeing to pay the rent to the mortgagee, and his accepting it. But this will only create a tenancy from year to year, and merely amounts to an admission of a tenancy then subsisting, and will not entitle the mortgagee to distrain for rent previously owing. The mortgagee merely giving notice to the tenant of his mortgage, and requiring the tenant to pay rent to him, does not create the relation of landlord and tenant between them. If the lease be *prior* to the mortgage, the mortgagee may, after giving notice to the tenant in possession, distrain for rent in arrear at the time of the notice, as well as for rent which may accrue after such notice, for the legal title is in the mortgagee. His remedy is on the lease as assignee of the reversion: (see *Rogers v. Humphreys*, 4 A. & E. 313; Arch. Land. & T. 12, 115, 2nd edit.)

*Q.*—Under the Tithe Commutation Act, to whom is the tithe-owner to apply in the first instance for his rentcharge; and, if not paid, what proceedings must he adopt, and against whom?

*A.*—The tithe-owner applies to the tenant in possession for his rentcharge. This rentcharge is payable half-yearly. Ten days' notice must be given at the usual or last known place of abode of the tenant in possession. In case of nonpayment by the tenant within twenty-one days after the rentcharge has become due, and after such notice, the owner may distrain upon the lands liable for the arrears, and dispose of the distress, when taken, in the same manner as a distress for rent. If the rentcharge is in arrear for forty days, and no sufficient distress can be found on the premises, the owner may have a writ directing the sheriff to assess the arrears, and may afterward sue out a writ of possession, and keep possession of the premises charged until the arrears and costs are fully satisfied. But it is provided, that no more than two years' arrears shall be recovered at any one time, either by the distress or writ of execution: (see 6 & 7 Will. 4, c. 71; 3 Steph. Com. 86, 3rd edit.)

*Q.*—What is the remedy for a wrongful distress?

*A.*—The remedy for a wrongful distress is generally either by an action of trespass, or on the case, or by an action of replevin; so trover will lie, as where the landlord has distrained things which are not distrainable: (see Arch. Land. & T. 280, *et seq.* 2nd edit.) It may be stated that where an *irregularity* occurs in taking a distress, the distrainer is not now, as formerly, a trespasser *ab initio*, if any rent is justly due: (11 Geo. 2, c. 19, s. 19.)

## REPLEVIN.

*Question.*—In what cases is replevin usually made? and state the nature of the action. How is it carried on in the County Court, and how in the court above?

*Answer.*—The action of replevin is one of the remedies the law gives for goods wrongfully taken. It is usually brought where goods have been taken as a distress. The action lies only for personal chattels, and not for trees growing, or things fixed to the freehold, &c.: (Arch. Land. & T. 282, 2nd edit.; and see Smith's Action at Law, 45, 5th edit.) In the County Court it is carried on by entering a plaint therein; and, on entering it, the plaintiff must specify and describe, in a statement of particulars, the cattle or goods and chattels taken under the distress, and the taking he complains of. The defendant is then summoned; and on the day appointed for appearance, the cause is heard in a summary way, as in other actions in the County Courts; or it may be tried by a jury, if either party wish. As soon as the cause has been removed into the court above, the defendant should enter an appearance to it. The plaintiff then declares, or may be compelled, by the defendant giving him notice so to do, within four days, otherwise judgment. The defendant may then be compelled to avow, by giving him notice to do so within eight days, otherwise judgment. The defendant may then give the plaintiff notice to plead in bar in four days, otherwise judgment. The issue is the same as in ordinary cases, but it may be made up by either plaintiff or defendant, as both parties are actors in replevin. For the same reason either party may make up the *nisi prius* record, and give notice of trial. The judgment for the plaintiff awards damages for the unlawful taking. The judgment for the defendant at common law is, that he have a return of the goods irrepleviable for ever, and his costs. If the distress was for rent, under the stat. 17 Car. 2, c. 7, it is that the defendant recover the amount of the arrears of rent, or value of the goods as found by the jury, and his costs: (see Arch. New C. L. Pract. 305 to 310, 2nd edit.; Smith's Action at Law, 253 to 256, 5th edit.)

*Q.*—By whom are replevins now granted, and in what court may an action of replevin be commenced?

*A.*—By the 19 and 20 Vict. c. 108, s. 63, it is enacted that the powers and responsibilities of the sheriff with respect to replevin bonds and replevins, shall henceforth cease; and the registrar of the County Court of the district in which any distress subject to replevin shall be taken, shall be empowered, subject to the regulations hereinafter contained, to approve of replevin bonds, and to grant replevins, and to issue all necessary process in relation thereto, and such process shall be executed by the high bailiff. An action of replevin may be commenced in the superior courts of common law; but if the replevisor wishes to commence his action in a superior court, he must, at the time of replevying, give security, to be approved by the registrar, for such an amount as such registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable cost of the cause, conditioned to commence an action of replevin against the distrainer in

such superior court as shall be named in the security, within one week from the date thereof, and to prosecute such action with effect, and without delay, and unless judgment is obtained by default, to prove before such superior court that he had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, was in question, or that such rent or damage exceeded 20*l.*, and to make return of the goods, if return be adjudged: (see sect. 65.) Proceedings may, however, be commenced in the County Court if the replevisor shall wish; he at the time of replevying giving security, to be approved by the registrar, for such an amount as shall cover the alleged rent or damage, and all costs, conditioned to commence his action of replevin in the County Court of the district in which the distress is taken, within one month after the date of the security, and to prosecute with effect, and to return the goods, if a return be adjudged (sect. 66; see also Co. C. Rule, 134 to 138.)

**Q.**—How would you proceed to remove an action of replevin into the superior courts?

**A.**—The 19 and 20 Vict. c. 108, enacts, any action of replevin brought in a County Court shall be removed into any superior court by *certiorari*. The defendant is to apply to such superior court, or to a judge thereof, for such writ, and to give security, to be approved by the Master of such superior court, for such amount, not exceeding 150*l.*, as such Master shall think fit, conditioned to defend such action with effect, and (unless the replevisor shall discontinue, or not prosecute such action, or become nonsuit therein) to prove before such court that the defendant had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, was in question, or that the rent or damage in respect of which the distress shall have been taken exceeds 20*l.*: (see sect. 58.)

**Q.**—Name the various pleadings in an action of replevin?

**A.**—They are: 1. The declaration, by the plaintiff. 2. The *avowry*, by the defendant, if the goods were taken in his own right; if in the right of another, the pleading is called a *cognizance*. 3. The plaintiff's next pleading is called a plea in bar, and that of the defendant a replication, and so on: (see Smith's Action at Law, 255, 5th edit.)

**Q.**—What is the meaning of the term “avowry?”

**A.**—It is the justification plea of the defendant, when he insists the goods were lawfully taken by him in his own right: (Holth. Law Dict. 2nd edit.; Smith, *supra*.)

**Q.**—What is the first writ in replevin called?

**A.**—Formerly the only mode of disputing the right of distress was by a writ which issued out of Chancery, called *replegiari facias*; it commanded the sheriff to deliver the goods to the owner, and afterwards do justice in respect of the matter in dispute in his own County Court. But by 52 Hen. 3, c. 21, the sheriff was authorized to replevy the goods without writ. And by 9 & 10 Vict. c. 95, ss. 119 to 121, replevin for rent arrear, or damage feasant, may be brought in the new County Courts without writ (see Smith's Action at Law, 253, 5th edit.); or, as before seen, it may be brought in a superior court.

**Q.**—Is a defendant in replevin in a different character from a defendant in any other action? and if so, explain the difference.

A.—Yes; he is considered in the light of a plaintiff. Either party may make up the issue, and give notice of trial; and also make up the *nisi prius* record, and enter it with the associate or judge's marshal for trial: (see Arch. New C. L. Pract. 308, 2nd edit.; Smith's Action at Law, 254, &c., 5th edit.)

## COUNTY COURTS.

*Question.*—Are the County Courts modern introductions, or are they of any antiquity; how far back does that antiquity extend; and name one or more writers by whom they are mentioned?

*Answer.*—County Courts are of great antiquity; they existed at common law, and are noticed in the laws of Edward the Elder. They are mentioned by Spelman, Finch, and other ancient writers. But the ancient County Court was not a court of record, like the present: (see Steph. Com. 377, 378, 3rd edit.)

Q.—In what cases have the superior courts concurrent jurisdiction with the County Courts?

A.—The superior courts have concurrent jurisdiction with the County Courts in all actions on contract, for any sum between 20*l.* and 50*l.*; and in such actions *ex delicto* as are within the jurisdiction of the County Court, where the damages to be recovered are between 5*l.* and 50*l.*; and in these cases the plaintiff may sue in either the superior or the County Courts, at his option. Also in actions on contract for a sum under 20*l.*, or in actions *ex delicto* for damages under 5*l.*, the superior courts have concurrent jurisdiction with the County Courts, in all cases where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material part within the jurisdiction of the County Court, within which the defendant dwells or carries on his business at the time of the action brought, or where any officer of the County Court shall be a party, except in respect of any claim to any goods or chattels taken in execution under the process of such court, or the proceeds of value thereof. And in these cases the plaintiff is entitled to costs if he recover: (Arch. New C. L. Pract. 7, 2nd edit., and *ante*, p. 82, 87.)

Q.—In what cases may a plaintiff sue in the County Court?

A.—A plaintiff may sue in the County Court for any debt, damage, or demand, not exceeding the sum of 50*l.*, not being for a malicious prosecution, or for libel or slander, or for seduction, or breach of promise of marriage: or if the title to any hereditaments, or any toll, fair, market, or franchise, is not in question. And by 13 & 14 Vict. c. 61, and the 19 & 20 Vict. c. 108, jurisdiction is given to the County Courts in all the above cases, if the parties agree by memorandum in writing, signed by them, or their attorneys: (see sects. 23, 25.) And by sect. 24, where the amount claimed is reduced by an admitted set-off below 50*l.* the County Court has jurisdiction: (s. 24.) And by sect. 50, where neither the annual rent nor value of any corporeal hereditaments shall exceed 50*l.*, upon which no fine or premium has been paid, and the

interest of the tenant in such hereditament has expired, or been determined by notice to quit, given either by the tenant or landlord, and the tenant, or any one claiming under him, refuses or neglects to give up possession, the landlord may proceed in the County Court to enforce the delivery up of possession : (sect. 50; see also sects. 51, 52, and 9 & 10 Vict. c. 95.)

**Q.**—State the cases in which you are compelled to sue under the Small Debts County Court Acts; and how, and where, the suit must be brought; and where must the parties be residing at the time?

**A.**—Under the Small Debts County Court Acts, you must sue in the County Court in claims arising *ex contractu*, if the debt, &c., does not exceed 20*l.*, and in claims arising *ex delicto*, if the damages do not exceed 5*l.*; except in cases where the superior courts have a concurrent or exclusive jurisdiction, as to which see *supra*. If the plaintiff does not sue in those courts in the above cases, he is deprived of his costs, unless a judge's certificate is obtained giving them to him. The suit is brought by entering a plaint, whereupon a summons is issued and served upon the defendant by the proper officer of the court. The suit is brought in the County Court in the district within which the defendant resides, or by leave of the registrar of the court in the district court in which the defendant dwelt, or carried on his business, within six calendar months next before the time of the action brought, or in which the cause of action arose: (see 9 & 10 Vict. c. 95; 13 & 14 Vict. c. 61; 15 & 16 Vict. c. 54, s. 4; 19 & 20 Vict. c. 108.)

**Q.**—Will any privilege protect a person from being sued in the County Court, and would the same privilege allow the party to sue in the superior courts for a debt that might be recovered in this court?

**A.**—Under the 9 & 10 Vict. c. 95, s. 67, a question arose as to whether an attorney, as plaintiff or defendant, still retained his privilege of suing and being sued in the court, of which he is an attorney, for causes of action which would otherwise come within the jurisdiction of these courts. But it has since been enacted by the 12 & 13 Vict. c. 101, s. 18, that "no privilege shall be allowed to any attorney, solicitor, or other person," to exempt him from the provisions of the statute 8 & 9 Vict. c. 95.

**Q.**—Can a party prosecute a plaint in a County Court, on a judgment recovered in one of the superior courts, for a debt less than 50*l.*?

**A.**—A party might formerly have prosecuted a plaint in a County Court on a judgment recovered in one of the superior courts, for a debt less than 50*l.* (*Winsor v. Darnford*, 12 Q. B. Rep. 603); but this is now otherwise: (see 19 & 20 Vict. c. 108, s. 27.)

**Q.**—Suppose a judge of a County Court should have exceeded his jurisdiction by trying a cause which he ought not to have tried, what steps can be taken against him?

**A.**—In such a case, a writ of *prohibition* may be obtained from any of the superior courts at Westminster. The application may be made to a judge at chambers for a rule or order for the writ, either in term or vacation (13 & 14 Vict. c. 61, s. 22); and the matter is to be finally disposed of by such rule or order, and no declaration or further proceedings in prohibition are allowed: (see 19 & 20 Vict. c. 108, s. 42.)

**Q.**—Is there any appeal from the decision of the County Courts, and in what cases?

*A.*—Yes; by the 13 & 14 Vict. c. 61, s. 14, either party in any cause to an amount exceeding 20*l.*, and not exceeding 50*l.*, if dissatisfied with the determination or direction of the court in point of law, or upon the admission or rejection of any evidence, may appeal to any of the superior courts of law at Westminster, two or more of the judges whereof shall sit out of term as a Court of Appeal. Within ten days after the determination or decision, the party appealing must give notice thereof to the other party, and security must also be given. This power of appeal did not extend to cases where the jurisdiction had been given to the court by consent of the parties, but stat. 17 & 18 Vict. c. 16, now gives a power of appeal in such cases. But by the 19 & 20 Vict. c. 108, the parties may, before the decision is pronounced, agree in writing, signed by them or their attorneys or agents, that the decision of the judge shall be final; and this agreement does not require any stamp.

## HIGHWAYS.

*Question.*—How are highways to be stopped up, diverted or turned?(*a*)

*Answer.*—By the Highway Act (5 & 6 Will. 4, c. 50, amended by 4 & 5 Vict. cc. 51, 59, and 8 & 9 Vict. c. 71), the inhabitants in vestry assembled may direct the surveyor to apply to two justices of the division to examine a highway, with a view to its being diverted or stopped up; and if a certificate of the justices in favour of the proceeding is sent to the Quarter Sessions, the justices there assembled are to make the order accordingly. But, in case of a diversion, the proceedings must be by consent of the owner of the lands through which the new highway is to pass. And a party, thinking himself aggrieved, may appeal from the certificate of the justices to the Quarter Sessions, before the order of that court is made: (3 Steph. Com. 226, 227, 3rd edit.)

## ATTORNEY AND CLIENT.

*Question.*—Where an attorney, who has given an undertaking to enter an appearance, has not appeared in pursuance of his undertaking, what will be the consequence?

*Answer.*—The court will punish him by attachment: (Rule Gen. 3; Arch. New C. L. Pract. 699, 3rd edit.)

(*a*) This question has also been asked several times in the Criminal Law division.



**Q.**—When an attorney has carried on a cause up to a certain point, can he stay it unless his client furnishes him with money?

**A.**—Yes; for although an attorney's undertaking to carry on a suit is an entire contract to carry it on to its termination, and can be determined by the attorney only upon reasonable notice, yet an attorney who has undertaken a cause is not bound to proceed in it without adequate advances, from time to time, by the client, for expenses out of pocket: (Arch. New C. L. Pract. 696, 2nd edit.; Chit. Arch. 75, &c., 9th edit.)

**Q.**—Assuming an attorney, by negligence or unskilfulness, so to mismanage his client's cause, that it is lost; has such client any remedy by action against such attorney; and, if so, in what form of action must he sue him?

**A.**—If the client has sustained damage from the gross negligence, or gross ignorance, of his attorney, he may maintain an action against his attorney for damages: (Arch. New C. L. Pract. 718, 2nd edit.) The form of action may be either case or assumpsit, as on breach of a contract: (Arch. N. P. 40.)

**Q.**—Can a party change his attorney during an action; and if so, are there any conditions imposed upon such party?

**A.**—No person can change his attorney without a judge's order for that purpose, and a copy of the order, or a notice of it, must be served on the adverse party, or his attorney; the order is made subject to the attorney's lien for costs: (Rule Gen. 4; Arch. New C. L. Pract. 697, 2nd edit.; Chit. Arch. 76, 9th edit.)

**Q.**—Has an attorney any lien upon a judgment, and, if so, of what nature?

**A.**—An attorney has a lien upon a judgment obtained by him for his client, and upon any money levied under an execution upon it for his costs in the suit in which the money is recovered; and no set off can be allowed to prejudice this lien: (Arch. New C. L. Pract. 706, 2nd edit.; Chit. Arch. 115, 9th edit.; *Simpson v. Lamb*, 28 L. T. Rep. 245.)

**Q.**—Is there any, and what, difference between the lien of a country attorney and that of his town agent, as to costs due from a client?

**A.**—Yes; the country attorney has a lien upon all papers, &c., of his client in his hands, to the extent of the general balance due to him from the client for costs. An agent to a country attorney has no lien for his *general* balance upon any money of the client which comes into his hands; but he has a particular lien to the extent of his agency charges in that particular suit: (see Arch. New C. L. Pract. 703, *et seq.* 2nd edit.; Chit. Arch. 115, 135, 9th edit.)

**Q.**—An attorney, at Christmas, delivers bills to four clients; one for borrowing 1000*l.* on mortgage; another for defending an action for a libel; a third for filing a bill in equity, to compel the completion of a purchase; and a fourth for defending a client charged with an assault, at the session. Are any, and which, of these bills liable to be taxed; and if the bills are delivered on the first of January and not paid, when can the attorney commence an action to recover them; and if the attorney had died, and the bills were delivered by his executor, would they be liable to be taxed?

A.—The bills delivered to all the four clients are liable to be taxed. And it makes no difference if the bills were delivered by the attorney's executor, the attorney being dead. The attorney cannot commence an action to recover the amount of his bill until one (calendar) month has elapsed from the delivery of the bill; therefore an action cannot be brought until the first of February: (6 & 7 Vict. c. 73; Arch. New C. L. Pract. 317, 318, 701, 2nd edit.; Gray on Costs, 525, *et seq.*; and see *Codwell v. Neal*, 28 L. T. Rep. 173.)

## II.—CONVEYANCING.

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### TENURES AND NATURE OF ESTATES.

*Question.*—State the ordinary tenure of land ?

*Answer.*—Tenures were anciently of several kinds ; thus, we had tenures by knight's service, free socage, grand serjeanty, petty serjeanty, tenure by cornage, and villein tenures, and to these tenures were annexed many burdensome conditions and services, which, although greatly ameliorated by several acts of Parliament, were not completely destroyed till the reign of Charles II., when an act (24 Car. 2, c. 12) was passed which turned all tenures into free and common socage, which is now termed freehold, except the villein tenures, which are now called copyholds ; it also reserved the ancient tenure of grand serjeanty, without its burdens. The ordinary lay (*a*) tenures, therefore, are now freehold and copyhold (in which latter is included lands held in ancient demesne and customary freeholds), with the derivate tenure of leaseholds : (see 1 Steph. Com. tit. "Tenures ;" Will. Real Pro. ; Burton's Comp.)

*Q.*—What is the custom of borough English ?

*A.*—Tenure subject to the custom of borough English is socage tenure ; but, according to custom, the estate descends to the *youngest* son in exclusion of all the other children. The custom does not in general extend to collateral relations : (see 1 Steph. Com. 198, &c. ; Will. Real Pro. 107, 4th edit.)

*Q.*—To whom will land, held according to the custom of gavelkind, descend ; and in what part of England does this custom more especially prevail ?

*A.*—The lands will descend not to the eldest son, but to all the sons in equal shares, and so to brothers and other collateral relations on failure of nearer heirs. The custom of gavelkind chiefly prevails in the county of Kent : (1 Steph. Com. 200 ; Will. Real Pro. 105, 4th edit.)

*Q.*—What is a disclaimer and its consequences ?

*A.*—No person can be compelled to take an estate by *conveyance*

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(*a*) The word "lay" is here used, for there is still the ecclesiastical tenure of frankalmoign to be occasionally met with.

against his will. Therefore, on his refusal to take the estate, the effect of the conveyance to him may be avoided by executing a deed of disclaimer : (see 1 Steph. Com. 460, 3rd edit.) But an heir-at-law cannot disclaim an estate which descends upon him, though he may as soon as he pleases, of course, dispose of the property by an ordinary conveyance : (see Will. Real Pro. 75, 4th edit.)

Q.—Explain the nature of the title by escheat and when it occurs ?

A.—Escheat is the resulting back to the original grantor or lord of the fee of lands, of which a tenant dies seised in fee simple, without having aliened them in his lifetime or disposed of them by his last will, and leaves no heir to take them by descent. In order to complete the title by escheat, it is requisite that the lord enter on the land escheated. Escheats are frequently divided into those *propter defectum sanguinis*, and those *propter delictum tenentis*, the former occurring when the tenant dies without heirs, the latter, when his blood is attainted : (see 1 Steph. Com. 401, 1st edit. ; 415, 416, 3rd edit. ; Will. Real Pro. 102, 103, 4th edit.)

Q.—What are the requisites to produce a merger of an estate ?

A.—It is a general principle of law that when a greater estate and a less coincide or meet in the same person, without any intermediate estate, the less is immediately sunk or *merged* in the greater. But they must come to one and the same person in the same right ; else if the greater estate be in his own right, and the less in right of another (*en autre droit*), there is no merger. But an estate tail will not merge into an estate in fee simple, although they meet in the same person ; in this case, therefore, there is an exception to the general rule : (1 Steph. Com. 304, 3rd edit. ; Will. Real Pro. 204, 234, 4th edit.)

Q.—What are estates less than freehold ?

A.—They are the following :—Estates for years ; estates at will ; estates at sufferance.

Q.—What is the largest and what the smallest estate of freehold of which a man can be seised ?

A.—An estate in fee simple is the largest, and an estate for life the smallest estate of freehold of which a man can be seised.

Q.—What is an estate of freehold ?

A.—It is an estate for life at least in lands of free tenure. It may be also an estate in fee simple or fee tail : (see Holth. Law Dict. ; 1 Steph. Com. 197, &c. ; Co. Lit. 43 b ; Will. Real Pro. 22, 4th edit.)

Q.—Mention the different senses in which the terms “estate” and “freehold” are used in connection with real property, and the meaning of each.

A.—Mr. Preston defines the word *estate* to be “the *interest* which any one has in lands or in any other subject of property ;” and this is the meaning generally given to it by legal writers. An estate in lands and tenements may be considered :—1. In reference to the nature of the ownership ; 2. In reference to the quantity of interest of which the estate is composed : (see further Preston on Estates ; Holth. Law Dict. ; 1 Steph. Com. 216.) The term *freehold*, when used in connection with real estate, denotes the tenure, and that the holder has a life estate at least : (see *supra*.)

*Q.*—State the rule in *Shelley's case*.

*A.*—The rule in *Shelley's case* may be concisely stated to be, that whenever an estate of freehold is given, and by the same conveyance or will an ulterior estate (whether mediately or immediately) is limited to the heirs of the same person in fee or in tail, such ulterior estate vests in that person himself in the same manner as if it had been expressly given to him and his heirs. The word "heirs" being a word of limitation, and not of purchase: (1 Steph. Com. 316, 2nd edit.; 319, 3rd edit.; Burton's Comp. pl. 339; Will. Real Pro. 211, 215, 4th edit.)

*Q.*—If real property be limited to A. for life, remainder to B. for life, remainder to the right heirs of the body of A., with remainder to the right heirs of B., what estates do A. and B. take respectively?

*A.*—A. will take an estate tail, subject to B.'s life estate, and B. will take the remainder in fee, under the above rule: (see Steph. *sup.*, Burton *sup.*, Will. *sup.*)

*Q.*—Describe an estate of inheritance.

*A.*—An estate of inheritance is where the tenant is not only entitled to enjoy the land for his own life, but where, after his death, it is cast by the law upon the persons who successively represent him in *perpetuum* in right of blood, according to an established order of descent. Estates of inheritance are either estates in fee simple or fee tail: (1 Steph. Com. 323, 325, 3rd edit.; Will. Real Pro. 74, 5th edit.)

*Q.*—What is the difference between an estate in fee simple and an estate in tail general?

*A.*—The difference between them is one of *quality*, not *quantity*: (see *post*, tit. "Estates in Fee Simple.") An estate in fee simple is the largest estate or interest the law of England allows a man to possess in landed property, and on the death of the owner intestate descends to his heirs either lineal or *collateral*; whilst a fee tail will only descend to the lineal heirs. Again, there is a difference in the mode of their conveyance: (see hereon *post*; Steph. Com. vol. 1; Will. Real Pro. 4th edit.; Burton's Comp.)

*Q.*—What are the several kinds of estates with regard to the time of their enjoyment?

*A.*—They are—1st. An estate in fee simple, which is the largest estate of which a man can be seised, being an estate of freehold and inheritance, descendable to heirs lineal and collateral, male or female. 2ndly. An estate tail, which is also an estate of freehold and inheritance, but in its descent it is restricted to *collateral heirs, i.e.* heirs of the body of the grantee; and the descent may be further restricted to the heirs male or female, or the issue by a particular wife. 3rdly. Estates for life, in which are included curtesy and dower (which two arise by operation of law); tenancy in tail after possibility of issue extinct; and estates *pur autre vie*. 4thly. Estates for years. 5thly. Estates from year to year, at will and sufferance: (see 1 Steph. Com. 221, &c. 3rd edit.; Will. Real Pro. 4th edit.)

*Q.*—What are the words of limitation properly used in a deed in creating each respective class of estate?

*A.*—The proper mode of creating an estate in fee simple is by limiting the estate "to (the grantee), his heirs and assigns for ever."

An estate tail is created by limiting it to the grantee, and the "heirs

*of his body.*" This limitation would create an estate tail general. An estate tail special is where the limitation is to particular heirs.

An estate for life is created either by an express limitation to the grantee "for and during his life," or the life of another, or simply to him without any further words of limitation, which in a deed gives him a life estate.

An estate for years is created by a grant or demise to the grantee, his executors, administrators and assigns (these words of limitation, however, are not essential), to hold for the term of      years.

An estate at will is where lands, &c., are let by one to another to hold at the will of both parties. It may be constituted by agreement (either written or verbal). A tenancy from year to year may be created by the agreement of the parties (either written or verbal). The best way to create this tenancy is to let the lands to hold "from year to year."

An estate at sufferance is where one comes into possession of land by a lawful title, and after his estate is ended, wrongfully continues in possession : (see 1 Steph. Com. 221, *et seq.* 3rd edit.; Will. Real Pro. 4th edit.)

**Q.**—How may an estate tail, an estate for life, and an estate for years be destroyed ?

**A.**—An estate tail may be destroyed by barring the entail and turning it into a fee simple, or by forfeiture; an estate for life or years may be destroyed by forfeiture, surrender or merger : (see references *sup.*)

## ESTATES IN SEVERALTY, JOINT TENANCY, TENANCY IN COMMON, AND COPARCENARY.

**Question.**—What is an estate in severalty ?

**Answer.**—An estate held by a man in his own right only, without any other person being joined or connected with him in point of interest during his estate therein: (1 Steph. Com. 323, 3rd edit.; Will. Real Pro. 81, 114, 4th edit.)

**Q.**—What is a tenancy in common ?

**A.**—A tenancy in common is where two or more hold the same land, with interests accruing under different titles; or accruing under the same title (other than descent), but at different periods; or conferred by words of limitation importing that the grantees are to take in distinct shares: (1 Steph. Com. 336, 3rd edit.; Will. Real Pro. 113, 4th edit.)

**Q.**—Who are joint tenants? and why are joint tenants so called ?

**A.**—Where an estate is acquired by two or more persons in the same land by the same title (not being a title by descent), and at the same period, and without any words importing that they are to take in distinct shares, they will take the estate as joint tenants : (1 Steph. Com. 324, 3rd edit.) Joint tenants are so distinguished, as they have a unity of

*possession*, a unity of *interest*, a unity of *title*, and a unity of *time*, in the commencement of their title: (Will. Real Pro. 109, 4th edit.; Steph. *sup.*)

**Q.**—Do estates held in joint tenancy, tenancy in common, and coparcenary, differ in any and what essential particulars?

**A.**—Yes; in the following:—Among joint tenants, and also among coparceners, there is a unity of title. In a tenancy in common this is not necessary; for one may hold by purchase, the other by descent. Joint tenants have also a unity of time. But as to tenants in common and coparceners this is not necessary: the estate of each may vest at a separate time. Among joint tenants, there is an entirety and equality of interest; they do not hold in distinct shares, but each is entitled to the whole, they being seised *per mi et per tout*; and there exists the *jus accrescendi*, or benefit of survivorship between them. Tenants in common and coparceners are each seised of a distinct though undivided share; and there is no benefit of survivorship between either tenants in common or coparceners: (1 Steph. Com. 325, *et seq.* 3rd edit.; Will. Real Pro. 81, 109, 113, 4th edit.; Burt. Comp. pl. 12, 13, 131.)

**Q.**—When two persons, not being partners, purchase an estate out of their own money, in equal shares, and take a conveyance of the estate simply to themselves in fee, what is the effect of this conveyance at law and in equity? and what difference would it have made if the purchase money had been contributed in unequal shares?

**A.**—If two persons purchase an estate and advance the money in equal proportions, and take a conveyance of the estate simply to themselves, they will hold the estate as joint tenants, both at law and in equity. But if they advanced the money in unequal shares, in case of the death of either of them, there will be no survivorship, but they will be deemed to be purchasers in the nature of partners, and to have intended to hold the estate in proportion to the sum which each advanced: (Story Eq. Jur. § 1206; Steph. Com. 312; Will. Real Pro. 111, 4th edit.)

**Q.**—A., B. and C. are brothers, A. being the eldest; B. and C. become joint tenants of land in fee simple; B., without C.'s knowledge, conveys his undivided moiety in fee to D. by way of mortgage—B. then dies: does C. on B.'s death take the entirety, or does a moiety (subject to the mortgage) descend on A. as B.'s heir-at-law?

**A.**—If B. conveys his undivided moiety to D. by way of mortgage, the mortgage, being an absolute conveyance, will sever the joint tenancy, and C. and D. will hold as tenants in common, and on B.'s death his share will descend to A., his heir, subject, of course, to the mortgage.

**Q.**—How is an estate in coparcenary created, and what persons are usually coparceners?

**A.**—An estate in coparcenary always arises by descent. Females are usually coparceners: (1 Steph. Com. 331, 332, 3rd edit.; Will. Real Pro. 81, 4th edit.)

**Q.**—Of what two sorts are coparceners? Why are they called coparceners?

**A.**—Coparcenary arises either by common law or particular custom. By common law, as where a person seised in fee simple or fee tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins or their representatives—in this case they shall all inherit;—and

these co-heirs are then called *coparceners*, or for brevity *parceners* only. Coparceners by particular custom are where lands descend, as in gavel-kind, to all the males in equal degrees, as sons, brothers, uncles, &c.: (1 Steph. Com. 331, 3rd edit.)

According to Littleton, parceners are so called because they always could be compelled to make *partition*: (sect. 241, Will. Real Pro. 81, 4th edit.) But so now can joint tenants and tenants in common: (see Steph. *sup.*, Will. *sup.*)

**Q.**—Can one tenant in common of a single house or a single field separate his interest from that of the other tenant in common, and how in each case?

**A.**—A tenant in common may have a decree for partition, although there be but one house or one field. But the court will frequently decree a pecuniary compensation to one, in order to make up his share to its proper value, where the estate cannot conveniently be divided into equal parts: (Story Eq. Jur. §§ 654, 657; Smith's Man. Eq. 612, 4th edit.)

**Q.**—How may a joint tenancy, or a tenancy in common, be severed?

**A.**—A joint tenancy may be severed:—1st. By partition. Thus, if two joint tenants agree to part their lands and hold them in severalty, they are no longer joint tenants, for they no longer hold promiscuously. 2ndly. The jointure may be destroyed by alienation without partition. As if one joint tenant conveys his estate to a third person, so if one joint tenant releases his share to the other, the jointure is dissolved, and turned into an estate in severalty. But a devise of one's share by will is no severance of the jointure. 3rdly. The jointure may also be severed by an accession of interest. Thus, if there be two joint tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure.

A tenancy in common may be dissolved:—1st. By partition. 2ndly. By uniting all the titles and interests in one tenant, by purchase or otherwise, which brings the whole to one severalty: (1 Steph. Com. 329, 330, 339, 3rd edit.; Will. Real Pro. 113, 114, 5th edit.)

## ESTATES IN REMAINDER, REVERSION, &c.

**Question.**—What is an estate in remainder? and what are the different kinds?

**Answer.**—A remainder is an estate limited to take effect and be enjoyed after a prior estate is determined, both estates being created at the same time: (see 1 Steph. Com. 295; Will. Real Pro. 197, 4th edit.) Coke described a remainder as “the remnant of an estate in lands or tenements expectant upon a particular estate, created together with the same at one time.” (Co. Lit. 143, a.)

Remainders are of two sorts, vested and contingent: (1 Steph. Com. 311, 3rd edit.)

**Q.**—What is an estate in reversion?



**A.**—An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him: (2 Bl. Com. 175; and see Co. Litt. 22, b; Steph. Com. *sup.*; Will. Real Pro. 198, 4th edit.)

**Q.**—What is a vested remainder?

**A.**—It is a present existing estate, always ready, so long as it lasts, to come into possession the moment the prior estate determines. As, if A. be tenant for twenty years, remainder to B. in fee; here B.'s is a vested remainder: (1 Steph. Com. 311, 3rd edit.; Will. Real Pro. 206, 207, 4th edit.)

**Q.**—What are cross-remainders? Can they be implied in a deed or will?

**A.**—When lands are given to two or more as tenants in common, it frequently happens that a particular estate is limited to each of the grantees in his share, with remainder over to the other or others of them. As, if a man gives lands to his two children as tenants in common in tail, and directs that on failure of the issue of one of them his share shall go over to the other in tail, and *vice versâ*. Such ulterior estates as these are called *cross-remainders*, because each of the grantees has reciprocally a remainder in the share of the other. In a *deed* they can be given only by express limitation, and can never be *implied*; though it is otherwise with respect to *wills*, where they may be raised not only by actual limitation, but also by implication: (1 Steph. Com. 338, 339, 3rd edit.; 1 Hughes Pract. Sales Real Pro. 355 to 357, 2nd edit.)

**Q.**—What is a contingent remainder? Show the technical creation of one?

**A.**—Contingent remainders are those limited either to an uncertain *person*, or upon an uncertain *event*. As a limitation to A. for life, remainder to the first son of B., who has then no son born; here is a contingent remainder, for it is not certain that B. will ever have a son: (see 1 Steph. Com. 311, 312, 3rd edit.; Will. Real Pro. 217, *et seq.* 4th edit.; Burt. Comp. Pl. 31.)

**Q.**—Will a chattel interest support a remainder?

**A.**—A chattel interest will support a vested remainder, as if a person seised in fee grants lands to A. for twenty years, and, after the determination of the said term, to B. and his heirs for ever; here A. is tenant for years (a chattel interest), and B.'s is a vested remainder: (1 Steph. Com. 306 to 311, 3rd edit.) But a contingent remainder, if it amounts to a freehold, cannot be limited after an estate for years, or any other particular estate less than a freehold: (1 Steph. Com. 314, 3rd edit.; Will. Real Pro. 224, 4th edit.)

**Q.**—In limitations in strict settlement, was the estate limited to trustees to preserve contingent remainders vested or contingent? State the reason for your answer.

**A.**—The estates given to trustees to preserve contingent remainders were vested. This was necessary in order to preserve the contingent remainders, for, as before seen, a contingent remainder requires a freehold to support it; therefore, if the particular estate had been prematurely determined by forfeiture, surrender or merger, the contingent remainder would have been destroyed. The vested estate given to trustees, to take effect on the premature determination of the particular estate,

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was the means of preventing this: (see Will. Real Pro. 233, *et seq.*, 4th edit.; 1 Steph. Com. 306, 1st edit.; 317, 3rd edit.)

**Q.**—A. on his marriage limited a freehold estate to the use of himself for life, with remainder to the use of his first and other sons successively in tail, with remainder to the use of B. in fee. Are either and which of the above remainders vested or contingent?

**A.**—The limitation of the remainder to the use of B. is a vested remainder. But the limitation of the remainder to the use of the sons of A. is a contingent remainder, for the reasons above stated: (Will. Real Pro. 237, 4th edit.)

**Q.**—Why were limitations to trustees to preserve contingent remainders formerly necessary, and why are they no longer required?

**A.**—Limitations to trustees to preserve contingent remainders were formerly necessary, because, if the particular estate had been prematurely determined by the voluntary act of the tenant for life, the contingent remainder would have been destroyed. Therefore, a vested estate in remainder was given to trustees to take effect in possession on the determination of the estate of the tenant for life otherwise than by his death, and to continue for the residue of his natural life, and thus preserve the contingent remainder. But by the 8 & 9 Vict. c. 106, s. 8, a contingent remainder existing at any time after the 31st day of December, 1844, shall be, and if created before the passing of that act shall be deemed to have been, capable of taking effect, notwithstanding the determination by forfeiture, surrender or merger, of any preceding estate of freehold in the same manner in all respects as if such determination had not happened: (see 1 Steph. Com. 317, 319, 3rd edit.; Will. Real Pro. *sup.*)

**Q.**—Explain the phrase “particular estate.”

**A.**—A limited legal interest or property in lands or tenements, as distinguished from the absolute property or fee simple therein, is usually so termed; and he who holds or enjoys such a limited interest therein is then sometimes called the *particular tenant*. Thus, if A. has the absolute property or fee simple in certain lands, and he demises them to B. for a term of years or for life, the legal interest which B. would thus acquire therein would be called the *particular estate* with reference to A.'s estate in fee simple; *i. e.* it would be a *particle* or portion carved out of A.'s fee: (Holth. Law Dic. 2nd edit.; Will. Real Pro. 196, 4th edit.; Steph. Com. 290.)

**Q.**—Of what sorts are estates in expectancy?

**A.**—There are at common law two sorts, *viz.*, estates in remainder and estates in reversion: (1 Steph. Com. 299, 3rd edit.)

## ESTATES FOR LIFE AND YEARS.

*Question.*—What are estates for life?

*Answer.*—Estates for life are freeholds not of inheritance: (Burton's Comp. pl. 723; Will. Real Pro. 22, 4th edit.; 1 Steph. Com. 239.)

*Q.*—State the general tenures of estates for life, and what denomination of property are they?

*A.*—A tenant for life only holds the lands during his life; and though he may part with his estate, if he pleases, it will terminate at his death, into whosoever hands it may have come. Every tenant for life has a freehold; and are real freeholds property: (see Will. Real Pro. 18, 22, 4th edit.; Burton, *sup.*; Steph. *sup.*)

*Q.*—What by common speech is he called, who holds for the term of his own life? and what he who holds for the term of another's life?

*A.*—When he holds for his own life, he is called tenant for life; when he holds for the life of another he is styled tenant *pur autre vie*: (Will. Real Pro. 11, 19, 4th edit.; Steph. Com. 239.)

*Q.*—What are the usual powers of a tenant for life over the estate?

*A.*—Every tenant for life, unless restrained by covenant or agreement, has the common right of all tenants to cut wood for fuel, for the making and repairing of all instruments of husbandry, and for repairing the house, and the hedges and fences, and has also a right to cut underwood, and lop pollards in due course. These powers are termed *botes* or *estovers*. But he is not allowed to cut timber, or commit any other kind of *waste*; either by voluntary destruction of any part of the premises, which is called *voluntary* waste, or by permitting the buildings to go to ruin, which is called *permissive* waste. So he cannot plough up ancient meadow land; and he is not allowed to dig for gravel, brick or stone, except in such pits as were open, and usually dug when he came in; nor can he open new mines for coal or other minerals, nor cut turf for sale on bog lands; for all such acts would be acts of *waste*. But to continue the working of existing mines, or to cut turf for sale in bogs already used for that purpose, is not *waste*. If, however, the estate is limited *without impeachment of waste*, he is allowed to cut timber in a husband-like manner for his own benefit, to open mines, and commit other acts of waste; but so that he does not pull down or deface the family mansion, or fell timber planted and growing for ornament, which is termed *equitable* waste, for the Court of Chancery, administering *equity*, will restrain such proceedings: (see Will. Real Pro. 23, *et seq.* 4th edit.; 1 Steph. Com.)

*Q.*—Is a tenant for life bound to pay off incumbrances, or to keep down the interest? and if a tenant for life discharge incumbrances, what is the consequence?

*A.*—With respect to the compulsory discharge of incumbrances the modern rule is this—that the tenant for life shall contribute, beyond the interest, in proportion to the benefit he derives from the liquidation of the debts. A tenant for life is bound to keep down the interest. If he pays off an incumbrance, he will be deemed a creditor to the amount

paid, upon the ground that there can be no presumption that, with his limited interest, he could intend to exonerate the estate. But this presumption may be rebutted by circumstances which demonstrate a contrary intention: (Story Eq. Jur. §§ 486, 487, 488; Smith's Man. Eq. Jur. 3rd edit.)

Q.—What are estates for years? and what denomination of property are they?

A.—An estate for years is only a chattel, and forms part of the personal estate: (Will. Real Pro. 8, 4th edit.; 1 Steph. Com. 263.)

Q.—What is the difference in the tenure of the following estates:—  
A lease to A. for ninety-nine years,—A lease to A. for ninety-nine years, if B. shall so long live.—A lease to A. for three lives.—A lease to A. for ninety-nine years, if he shall so long live?

<sup>60</sup> A.—A lease to A. for ninety-nine years, also a lease to A. for ninety-nine years, if B. (or A.) shall so long live, are leaseholds merely; whilst a lease to A. for three lives is a freehold interest: (Will. Real Pro. 328, 4th edit.; Steph. Com. vol. 1.)

Q.—Can a lessee for 999 years grant a lease for life? and give the reason for your answer.

A.—A lessee for 999 years cannot grant a lease for life, for the estate for 999 years is the lesser estate in the eye of the law: (see references *sup.*)

Q.—What is special occupancy?

A.—If A., having an estate for life, should dispose of it to B. and his heirs, B.'s estate will last so long as A. lives; if, therefore, B. should die before A., his heir may enter and hold possession, and in such a case is called in law a *special occupant*: (Will. Real Pro. 20, 4th edit.; 1 Steph. Com. 461.)

Q.—What is an *interesse termini*? and is it assignable?

A.—An *interesse termini* is that species of property or interest which a lessee for years acquires in the lands demised to him before he has actually become possessed of the lands by entry: (Holth. Law Dic. 3rd edit.) The bare grant does not of itself vest the term in the grantee; it only gives him a right of entry which is called an *interesse termini*, or an interest in the term: (1 Steph. Com. 276, 3rd edit.; Will. Real Pro. 329, 4th edit.) An *interesse termini* may be granted over to another, or may be extinguished by surrender or release: (1 Steph. Com. *sup.*; Burton's Comp. pl. 907.)

## ESTATE TAIL.

Question.—What is an estate tail?

Answer.—Where an estate is given to a man and the *heirs of his body*, he is said to have an estate tail. This is such an estate as will, if left to

itself, descend on the decease of the first owner to all his lawful issue, children, grandchildren, and more remote descendants, so long as his posterity endures, in a regular order and course of descent from one to another; and, on the other hand, if the first owner should die without issue, his estate, if left alone, will then determine: (Will. Real Pro. 30, 4th edit.; 1 Steph. Com. 228.)

Q.—By force of what statute is a fee tail?

A.—By force of the statute *De Donis*, 13 Edw. 1, c. 1, called also the Statute of Westminster the second: (see Will. Real Pro. 38 and note, 4th edit.; 1 Steph. Com. 228, 229.)

Q.—How many kinds of estate tail are there?

A.—There are two kinds of estates tail, viz., tenancy in *tail general*, and tenancy in *tail special*. Estates tail may also be in *tail male*, or in *tail female*: (Will. Real Pro. 30, 4th edit.; 1 Steph. Com. 228, &c.)

Q.—What constitutes an estate in tail general, and what special?

A.—It is general where it is given to one and the heirs of his body generally, and without restriction. Special, when it is restrained to certain heirs of his body, and does not go to all of them in general; thus, if an estate be given to a man and the heirs of his body, by a particular wife; here none can inherit but such as are his issue by the wife specified: (Will. Real Pro. *ubi sup.*; 1 Steph. Com. *ubi sup.*)

Q.—By what words in a deed may an estate in tail male, in tail general, and in tail special, be aptly created?

A.—An estate in tail male is created in a deed by a limitation to one and the heirs male of his body; in tail general, to a man and the heirs of his body; in tail special, to a man and the heirs of his body, on Mary his now wife to be begotten: (Will. Real Pro. 30, 4th edit.; Burton's Comp. pl. 647, 655; 1 Steph. Com. 231.)

Q.—At what time is a possibility of issue extinct?

A.—On the death of the person out of whose body the issue was to spring. A tenancy in tail, after possibility of issue extinct, can only happen where a man is tenant in special tail, as where the estate is given to a man and the heirs of his body by his present wife; in this case if the wife should die without issue, he would become tenant in tail after possibility of issue extinct: (Will. Real Pro. 49, 4th edit.; 1 Steph. Com. 244.)

Q.—If lands are conveyed to A. and the heir of his body, what estate or interest does A. take? Does he take an estate for life, an estate tail, or an estate in fee simple?

A.—If lands are conveyed to A. and the heir of his body by deed he will only take an estate for life; for in a deed the word *heirs* is absolutely necessary to give a fee: (1 Hughes Pract. Sales Real Pro. 337, 2nd edit.; Burton's Comp. pl. 651.) But a devise to A. and the heir of his body in the singular number will give him an estate tail, for in a will the intention of the testator is looked at: (1 Hughes Pract. Sales Real Pro. 336, 2nd edit.)

Q.—If lands be given to A. and the heirs male of his body begotten, who shall and who shall not inherit?

A.—None but heirs male shall inherit: (Will. Real Pro. 30, 4th edit.; Steph. Com. 231.)

Q.—An estate is limited to the use of A. for life, and after his death to the use of the heirs of his body; what estate does A. take?

A.—A. takes an estate tail under the rule in *Shelley's case*: (see Will. Real Pro. 210, 4th edit.; Burton's Comp. pl. 653; and *ante*, p. 117.)

Q.—State the date and title of the act of Parliament under which an estate tail can now be barred, and the mode by which it could have been barred prior to that act.

A.—The act referred to in the question is the 3 & 4 Will. 4, c. 74, passed in the year 1833, intitled "An Act for the Abolition of Fines and Recoveries, and for the substitution of more simple and easy modes of assurance." Under this act estates tail are now barred, by deed, enrolled in Chancery within six months after execution.

Q.—What are the principal enactments of the 3 & 4 Will. 4, c. 74, commonly called the Fines and Recoveries Act?

A.—The principal enactments of the 3 & 4 Will. 4, c. 74, are to abolish fines and recoveries, and substitute more simple and easy modes of barring estates tail and dower, and to enable married women to convey their estates. There are a variety of other provisions too numerous to be here mentioned.

Q.—Explain the nature and objects of fines and recoveries, and what was substituted in their place by the act of Parliament abolishing the same.

A.—In their nature fines and recoveries were fictitious actions at law, and their effect was to bar estates tail and dower, and to pass the interest of married women in real property. A fine is defined to be an amicable agreement or composition of a suit, whether real or fictitious, between the demandant and tenant, with the consent of the judges, and enrolled among the records of the court where the suit is commenced, by which lands and tenements are transferred from one person to another, or any other settlement made respecting them. It was called a fine, because it put an end to all suits and controversies. A recovery, like a fine, supposed a suit at law by the intended purchaser against the vendor, and was commenced by a writ called a *præcipe quod reddat*, and went on to judgment and execution: (Holth. Law Dic. 2nd edit.; 1 Steph. Com. 537, *et seq.* 3rd edit.) The 3 & 4 Will. 4, c. 74, substitutes a deed enrolled in the Court of Chancery, as well for a fine as a recovery: (1 Steph. *ubi sup.*; Will. Real Pro. 47, 4th edit.) *It is now acted as the*  
*it is now done as a deed. Not by a writ but by a deed.*

Q.—When were fines and recoveries abolished, and how may an entail be barred at this day? 1. By tenant in tail in possession? 2. By tenant in tail in remainder?

A.—Fines and recoveries were abolished in the year 1833, by the statute 3 & 4 Will. 4, c. 74, which enables every tenant in tail, whether in possession, reversion, remainder or contingency, or otherwise, to dispose of the lands entailed for an estate in fee simple absolute, or any less estate, by any of the assurances, except a will, which would suffice to pass an estate in fee simple absolute. The disposition must be an actual conveyance, and not resting merely in contract, and it must be by deed, and enrolled in Chancery within six calendar months after execution. Such conveyance bars the entail, as against all persons claiming under the estate tail, or in respect of any ulterior estate: (ss. 15, 40, 41; 1 Steph. Com. 237; Will. Real Pro. 44, 4th edit.)

When the estate tail to be barred is in remainder the consent of the protector to the settlement must be obtained in order to bar any remainder over the entail : (ss. 22, 32, 34; and see also Will. Real Pro. 47, 4th edit. ; 1 Steph. Com. 237, 531, &c.)

**Q.**—By what means can a tenant in tail convert his estate tail into an estate in fee ?

**A.**—A tenant in tail may convert his estate in fee by deed enrolled in Chancery within six months after execution. But if there should be a protector, his consent will be necessary : (3 & 4 Will. 4, c. 74, ss. 40, 41, 34; and see Will. *ubi sup.*; 1 Steph. *ubi sup.*)

**Q.**—Money is directed to be laid out in the purchase of lands to be settled, and of which A. would be tenant in tail. A. prefers having the money instead of its being laid out ; can he by any, and what means, avoid such investment, and obtain the money to be paid to him at his own disposal ?

**A.**—If A. prefers having the money instead of its being laid out, he may obtain it by executing a deed of assignment by way of disentailing assurance : (3 & 4 Will. 4, c. 74, s. 71; Hayes Introd. Convey. 185, 4th edit.; and for a form of assignment, *id.* p. 634.)

**Q.**—Is any reference to the statute necessary in a disentailing assurance? and what is the effect of omitting the enrolment of the deed within the specified time ?

**A.**—No reference to the act is necessary (*a*) in a disentailing assurance; what the act requires is, that it must be evidenced by deed : (s. 40; and for a form of assurance, see 2 Hughes Pract. Sales Real Pro. No. 22; Appendix, 2nd edit.) The effect of omitting the enrolment of the deed within the specified time will be, that the assurance will not have any operation under the act : (see Sug. Real Pro. Stats. 213.)

**Q.**—A. is tenant for life in possession, B. is tenant in tail in remainder. Can B. by any and what means convert his estate into a fee simple? {

**A.**—It is supposed the estates of A. and B. were created by the same settlement; therefore A. will be the protector thereof, and B. cannot, without A.'s consent, convert his estate tail into a fee simple : (3 & 4 Will. 4, c. 74, ss. 15, 34; and see Will. Real Pro. 47, 4th edit.; 1 Steph. Com. 237, 531, &c.)

**Q.**—Before the 3 & 4 Will. 4, c. 74, whose concurrence was necessary to enable a tenant in tail in remainder expectant on an estate of freehold to bar the entail; and whose concurrence is now necessary?

**A.**—Before the 3 & 4 Will. 4, c. 74, the consent of the person who was seised of the preceding estate of freehold, upon which the estate tail <sup>q</sup> was expectant, was necessary, technically termed the tenant to the *præcipe*; since the above act the consent of the protector is necessary : (see Will. *sup.*, Steph. *sup.*)

**Q.**—Who is "protector of the settlement?" Can a tenant in tail in remainder bar his estate tail without the protector's consent? and if so, what are the nature and liabilities of the estate which he can create? (*b*)

(a) But in practice, the object of the deed is of course stated.

(b) The latter part of this question has also been put in the following form :—If entailed property is disposed of by a deed executed by the tenant in tail, but not by the protector of the settlement, what is the effect of such deed?

A.—The protector of the settlement is created by the 3 & 4 Will. 4, c. 74, being a character unknown prior to this act; but his office assimilates very much to that of the tenant to the *præcipe* under the pre-existing law, operating in like manner as a check upon the too free alienation of settled property. In ordinary cases he is the first tenant for life, but he may be appointed by the settlor without his taking any estate or interest whatever. A tenant in tail in remainder may, without the protector's consent, by an assurance under this act, bar his own estate tail, and thus create a base fee; the consequence of such a limited bar is, that the tenant acquires a disposable estate in the land so long as he has any issue, and no longer. But, when his issue fails, the persons having estates in remainder or reversion become entitled: (see Will. Real Pro. 47, 48, 4th edit.; 1 Steph. Com. 237, 534, &c.)

Q.—In case the person who would otherwise be protector is a lunatic, idiot, or of unsound mind, who is then the protector?

A.—The 3 & 4 Will. 4, c. 74, s. 33, provides that in case any person, protector of a settlement, shall be lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, then the Lord Chancellor or other the person or persons for the time being entrusted by the King's or Queen's sign manual with the care and commitment of the custody of the persons and estates of lunatics or idiots, &c., shall be the protector of the settlement in lieu of the person so being a lunatic, &c.: (Browell's Real Pro. Stats. 82; 1 Steph. Com. 536.)

Q.—Who is protector of a settlement made since the statute for the abolition of fines and recoveries took effect, and who of a settlement made before that period?

A.—Since the statute for the abolition of fines and recoveries took effect, the protector is generally the person having the first estate for life, in analogy to the old law. But it is not necessary that he should be seised of an estate of freehold, or even that he should take any estate or interest whatever; he is a kind of mixed character, sometimes deriving his origin from the estate which he takes in the property; at others, from a mere appointment by the settlor. Before the above act took effect, the person who was seised of the preceding estate of freehold, technically termed the tenant to the *præcipe*, was the protector: (see Will. *sup.*, Steph. *sup.*)

Q.—Where a married woman is protector of the settlement, how is her consent given in order to bar the entail?

A.—Where the prior estate of a married woman (sufficient to constitute her protector) is not settled to her separate use, she and her husband together will be protector; but if settled to her separate use, she alone will be protector, and in the latter case she may consent to an alienation without her husband's concurrence as if she were sole: (sect. 24; *Kerr v. Brown*, 33 L. T. Rep., 179; Browell's Real Pro. Stats. 87.)

Q.—In what case does a judgment against a tenant in tail bind his issue and the remainder-man?

A.—When the tenant in tail could have barred the entail without the consent of the protector of the settlement: (1 & 2 Vict. c. 110, ss. 11, 13; 1 Steph. Com. 238; Will. Real. Pro. 52, 4th edit.; Browell's Real Pro. Stats. 221, 224.)

Q.—Prior to the 3 & 4 Will. 4, c. 74, if a tenant in tail, with the immediate remainder or reversion in fee to himself, levied a fine, he created what was called a base fee, which immediately merged in the



reversion, and became subject to any charges affecting the latter, the title to which he was also in future obliged to show. What difference in this respect has been made by the above statute, both as respects past and future cases?

A.—By the 3 & 4 Will. 4, c. 74, it is enacted, that if a base fee in any lands, and the remainder or reversion in fee in the same lands, shall at the time of the passing of this act, or at any time afterwards, be united in the same person, and *at any time after* the passing of this act there shall be no intermediate estate between the base fee and the remainder or reversion, then and in such case the base fee shall not merge, but shall be *ipso facto* enlarged into as large an estate as the tenant in tail, with the consent of the protector, if any, might have created by any disposition under this act, if such remainder or reversion had been vested in any other person: (sect. 39.) So that now, by the union of these two estates, the base fee becomes a fee simple, and the reversion, with all charges thereon, is consequently destroyed: (see Brówell's Real Pro. Stats. 96.)

Q.—Can a tenant in tail make a lease which will bind any and what persons after his decease? State the authority for your answer.

A.—The act for the abolition of fines and recoveries now empowers every tenant in tail in possession to make leases by deed, without the necessity of enrolment, for any term not exceeding twenty-one years, to commence from the date of the lease, or from any time not exceeding twelve calendar months from the date of the lease, where a rent shall be thereby reserved, which at the time of granting such lease shall be a rack rent, or not less than five-sixth parts of a rack rent: (see Will. Real Pro. 50, 51, 4th edit.; 1 Steph. Com. 542; see also 19 & 20 Vict. c. 120, ss. 32, 33.)

Q.—If a tenant in tail discharge incumbrances on the inheritance, what is the consequence?

A.—If a tenant in tail, in possession, pays off an incumbrance it will ordinarily be treated as extinguished, and the remainder-man cannot be called upon for a contribution, unless the tenant in tail has kept alive the incumbrance by some suitable assignment, or has otherwise manifested his intention to hold himself out as a creditor of the estate in lieu of the mortgagee; because a tenant in tail in possession can make himself absolute owner of the estate. But the like doctrine does not apply to a tenant in tail in *remainder*, whose estate may be altogether defeated; for if he pays off an incumbrance, it must be presumed that he means to keep it alive. But the presumption may be rebutted by circumstances which denote a contrary intention: (Story's Eq. Jur. § 486; Smith's Man. Eq. Jur. 270, 3rd edit.)

Q.—Suppose a tenant in tail conveys the fee simple of an estate by lease and release to a purchaser; what estate does the purchaser acquire?

A.—If the tenant in tail was in possession, the purchaser, provided the deed be enrolled within the six months, will acquire the fee simple. If the tenant in tail's estate was in remainder, the purchaser, if the protector consent, will also acquire the fee, for by sect. 40, *et seq.*, any assurance, unless it be a will, by which a person can convey the legal estate in fee simple absolute, provided it be enrolled as prescribed by the act, will suffice: (see 1 Hughes Pract. Sales Real Pro. 150, 177, 2nd edit.) It should be remembered that the statute 4 & 5 Vict. c. 21, abolished the lease for a year, rendering a release as effectual as a lease and release.

**Q.**—How is an estate tail in copyholds barred; distinguish between the mode of barring legal and equitable estates tail?

**A.**—When the estate is legal it must be barred by surrender; but when the estate is merely equitable, either by surrender or by deed: (s. 50.) And if there should be a protector, his consent will be necessary in order to create an effectual bar as well in copyholds as freeholds: (see Browell's Real Pro. Stats.; Will. Real Pro. 301, &c. 4th edit.; 1 Steph. Com. tit. "Copyholds.")

**Q.**—Land is by deed limited to the use of A. for life, with remainder to B. in fee. B. dies, having by another instrument, namely, his will, devised the land (subject to A.'s life estate) to C. in tail, with remainder over. A. is still living, C. is desirous of barring his estate tail. State whether there is any protector of the settlement whose consent is necessary in order to enable C. to bar the estate tail.

**A.**—There is no protector in this case; the provision as to protectorship in the act 3 & 4 Will. 4, c. 74, is expressly confined to the case where the prior estate is created by the *same settlement* as the entail: (s. 22; Sug. Real Pro. Stats. 201; 1 Steph. Com. 533.)

**Q.**—Can personal property be entailed?

**A.**—An estate tail cannot be had in such property at law, nor does equity admit of any similar interest. A gift of personal property to A. and the heirs of his body will simply vest in him the property given: (Will. on Personal Pro. 191.) But personal property may be so settled as to answer the purpose of an entail.

## ESTATES IN FEE SIMPLE.

**Question.**—What is an estate in fee simple?

**Answer.**—A fee simple estate is the largest estate or interest which the law of England allows any person to possess in landed property: (Will. Real Pro. 54, 4th edit.; 1 Steph. Com. 228, 3rd edit.)

**Q.**—Who is a tenant in fee simple?

**A.**—A tenant in fee simple is he that holds lands or tenements to him and his heirs, so that the estate is descendible not merely to the *heirs of his body*, but to *collateral* relations, according to the rules and canons of descent: (Will. Real Pro. *ubi sup.*; 1 Steph. *ubi sup.*)

**Q.**—What words will create or pass a fee simple estate in a will or in a deed respectively?

**A.**—In a will the fee will pass without any words of limitation, unless a contrary intention appears by the will: (1 Vict. c. 26, s. 28.) But in a deed, the word *heirs* is absolutely necessary to be used as a word of limitation to mark out the estate, and no other word or periphrasis can supply its place; as, if a man purchase lands to hold *to him for ever*, or *to him and his assigns for ever*, he will only take an estate for life: (Will. Real Pro. 120, 4th edit.; Burton's Comp. pl. 21; 1 Steph. Com. 223.)

**Q.**—Into what sorts are estates in fee simple divided ?

**A.**—They are divided into three sorts : 1st. Absolute (that is, free from all condition or qualification.) 2nd. Qualified or base. 3rd. Conditional ; a division, however, which relates to the *quality* and not to the *quantity* of the estate : (1 Steph. Com. 230, 3rd edit.)

## USES AND TRUSTS.

**Question.**—What is the difference between uses and trusts ? and state the form of expression by which each is created.

**Answer.**—A use is that interest which the Statute of Uses (27 Hen. 8, c. 10) transfers into possession, thereby making the *cestui que use* complete owner of the lands, as well at law as in equity ; a trust, when used in the sense of an interest, is the equitable or beneficial interest or ownership of or in real or personal estate existing apart from and collateral to the legal interest or ownership : (Smith's Man. Eq. Jur. 96, 2nd edit. ; Story's Eq. Jur. § 290, *et seq.* ; 1 Steph. Com. 341, 3rd edit. ; Will. Real Pro. 129, &c., 4th edit.)—*The form of expression. "To the use of" &c.*

**Q.**—State the principal provisions of the Statute of Uses, and the causes which led to its enactment.

**A.**—The Statute of Uses (27 Hen. 8, c. 10) enacts that where any person shall be seised of lands, &c., to the use, confidence, or trust of any other person, such latter person (the *cestui que use*) shall from thenceforth stand and be seised, &c., of the land of and in the like estate as he has in the use, &c., and that the estate of the person so seised to uses shall be deemed to be in the *cestui que use* in such quality, manner, form and condition as he had before in the use. The causes which led to its enactment were to prevent the evils arising from uses, and its object to annihilate them altogether ; but, so far from attaining this end, it became the means of introducing a new mode of conveyance admirably adapted to the exigencies of mankind : (Will. Real Pro. 131, 133, 4th edit. ; Steph. Com. 338.)

**Q.**—What is a shifting use ?

**A.**—It is future or executory interest created under the Statute of Uses. A common instance of a shifting use occurs in ordinary marriage settlements of lands ; *ex. gr.*, suppose A. to be the settlor, the lands are conveyed by him, by the settlement executed a day or two before the marriage, to trustees "to the use of A. and his heirs until the intended marriage shall be solemnized, and from and immediately after the solemnization thereof," to the uses agreed on : (Will. Real Pro. 241 to 243, 4th edit. ; 1 Steph. Com. 503 ; 1 Hughes Pract. Sales Real Pro. 286, 287, 2nd edit.)

**Q.**—What is the difference between an executory devise and a shifting use ?

**A.**—An executory devise is a conditional limitation by will ; a shifting use is the same by deed operating under the Statute of Uses : (see references *sup.*)

## LEGAL AND EQUITABLE ESTATES, POWERS, &amp;c.

*Question.*—What is a legal, and what an equitable estate?

*Answer.*—Legal estates are those limitations of interests in realty which give a party a right at law to the ownership and profits; an equitable estate is such an interest as is not, for most purposes, noticed at law, but in equity, is in fact the beneficial ownership of the land and its profits as distinguished from the mere legal seisin: (1 Steph. Com. 222, 3rd edit.; Will. Real Pro. 135, 4th edit.)

*Q.*—Settlement of fee simple estates to the use of A. for life, remainder to the use of B. and his heirs, in trust for C. and his heirs. Do B. and C. respectively take legal or equitable estates? and to whom must A. surrender his life estate, in order to cause its merger?

*A.*—B. takes the legal estate in remainder, and C. will have only the equitable estate; A. must therefore surrender to B. in order to cause a merger.

*Q.*—A feoffment to A. and his heirs to the use of B. and his heirs; what estates, legal and equitable, do A. and B. take respectively? and explain the operation of the Statute of Uses in the above limitation.

*A.*—On a feoffment as above B. will take both the legal and equitable estate. For the Statute of Uses transfers the estate to the *cestui que use* in the same manner as if the feoffees to uses, after the conveyance to them, had actually conveyed their estate to each respective *cestui que use*, thus passing to them a legal instead of an equitable interest; such uses, in fact, taking effect out of the seisin of the feoffees immediately on the execution of the conveyance, they being considered a mere conduit pipe to the *cestui que use* uses: (see Will. Real Pro. 131, *et seq.*; 1 Steph. Com. 339.)

*Q.*—A. by bargain and sale conveys a fee simple estate to B. and his heirs, to the use of C. and his heirs. What estates, legal or equitable, do B. and C. respectively take?

*A.*—The legal estate is vested in B. and his heirs, and C. and his heirs take but an equitable interest; for by the effect of the bargain and sale the alienee has but a use, which is executed by the Statute of Uses (27 Hen. 8, c. 10), and as a use cannot be limited on a use, it follows, that any further use, limited by the conveyance, will not be executed, but remain a mere equitable interest: (see Burton's Comp. pl. 151; 1 Steph. Com. 341, 492; Will. Real Pro. 149, 4th edit., where it is fully explained.)

*Q.*—Feoffment to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs. Explain the operation of the Statute of Uses in the above limitation?

*A.*—The statute executes the use in B. and his heirs, and gives him the legal estate; and as a use cannot be limited on a use, C. has merely an equitable interest: (see Will. Real Pro. 134, 4th edit.; 1 Hughes Pract. Sales Real Pro. 291, 292, 2nd edit.; 1 Steph. Com. 339.)

*Q.*—A., under a power, appoints a fee-simple estate to B. and his heirs, to the use of C. and his heirs. What estates, legal and equitable, do B. and C. respectively take?

*A.*—Powers do not operate as a conveyance of the possession of the estate, but like a bargain and sale, as a limitation of a use ; if, therefore, *A.* appoints to *B.* and his heirs, to the use of *C.* and his heirs, *B.* will take the legal estate, and the use to *C.* will be a use upon a use, which, as already seen, is not executed or turned into a legal estate by the Statute of Uses ; *C.* will, therefore, take the equitable estate : (Will. Real Pro. 246, 247, 4th edit. ; 1 Steph. Com. 506, 507.)

*Q.*—A fee-simple estate is conveyed to such uses as *A.* shall appoint ; *A.*, in execution of his power, appoints to *B.* and his heirs, to the use of *C.* and his heirs, in trust for *D.* and his heirs. In whom is the legal estate ?

*A.*—In this case *B.* takes the legal estate, but he holds it in trust, not for *C.* (who takes nothing), but for *D.* and his heirs : (Co. Litt. 271 b, note ; 1 Steph. Com. *ubi sup.* ; Will. Real Pro. *ubi sup.*)

*Q.*—If *A.* (seised to uses to bar dower) appoints the fee to *B.* to the use of *C.*, *D.*, and *E.*, would the estates of *C.*, *D.*, and *E.* be legal or equitable ?

*A.*—The estates of *C.*, *D.*, and *E.* would be equitable for the reasons before stated : (see Will. Real Pro. 246, 247, 4th edit. ; 1 Steph. Com. 507.)

*Q.*—Devise since the Wills Act to *A.* and his heirs, in trust to apply the rents for specified purposes for a limited time, and then in trust for *B.* and his heirs. In whom is the legal estate ?

*A.*—The legal estate will remain in *A.* in order to enable him to perform his trust ; but as soon as the purposes for which the trust was raised are satisfied, the legal estate will be shifted to *B.* and his heirs : (see 1 Steph. Com. 354, note, 3rd edit.)

*Q.*—Lands stand limited to such uses as *A.* shall by deed appoint, and in default of appointment to the use of *A.* in fee ; *A.*, in pursuance of his power, appoints, and by way of further assurance conveys to *B.* and *C.* and their heirs to uses. Are the uses executed by the Statute of Uses, or do they take effect in equity only ?

*A.*—If the power is valid and subsisting at the time of the appointment the subsequent conveyance is, of course, inoperative, and the uses will take effect in equity only ; but if the power should by any means have been suspended or extinguished, then the conveyance takes effect, and the uses are turned into possession : (see Will. Real Pro. 251, 252, 4th edit.)

*Q.*—*A.*, by bargain and sale duly enrolled, conveys to *B.* and his heirs, to the use of *C.* and his heirs, in trust for *D.* and his heirs. What estates or interests do *B.*, *C.*, and *D.* respectively take ?

*A.*—*B.* will take the legal estate, and he will hold in trust, not for *C.* (who takes nothing), but for *D.* and his heirs : (see Co. Litt. 271 b, note ; Will. Real Pro. 149, &c., 4th edit. ; 1 Steph. Com. 492.)

*Q.*—Where an estate is devised to *A.* and his heirs in trust to permit *B.* and his heirs to receive the rents and profits, what estate does *B.* take ?

*A.*—The statute will execute the use in *B.* and give him the legal estate : (see 1 Hughes Pract. Sales Real Pro. 292, 2nd edit.)

Q.—Conveyance unto and to the use of A., B., and C., and their heirs. What estates do they respectively take ?

A.—A., B., and C. will take the legal and equitable fee as joint tenants : (Will. Real Pro. 132, 133, 4th edit. ; 1 Steph. Com. 339, &c.)

Q.—Suppose a feoffment made to T. S. and his heirs, to the use of A. for life, with remainder to the use of his first son (unborn) in tail, with remainder to the use of B. in fee ; does any and what estate remain to T. S. until the birth of a son to A. ?

A.—T. S. is said by some persons to retain a seisin to serve the use to the unborn son of A., whilst, according to others, all the uses are at once executed, but subject to be divested to let in the son of A. and his issue, when born. The question involves the doctrine of *scintilla juris*, and on which see Fearn's Contingent Remainders ; Burton's Comp. pl. 162, note ; Cruise on Uses, 164, *et seq.* ; 1 Steph. Com. 340, n.

Q.—Suppose T. S. makes a feoffment to the use of A. for life, with remainder to the use of the heirs of his (T. S.'s) body ; does any and what estate exist in T. S. ; and distinguish between the above case and that of a feoffment by T. S. to the use of A. for the life of him (T. S.) with remainder to the use of the heirs of his (T. S.'s) body.

A.—In the first instance, there is a resulting use to T. S., which, coalescing with the limitation to the heirs of his body, gives him an estate tail, besides his reversion in fee : (Burton's Comp. pl. 342, 343.) In the second case, where the feoffment is made to the use of A. for the life of T. S., with remainder to the heirs of the body of T. S., there is no resulting use, but only a reversion in the feoffor ; for there can be no resulting use where the use is declared to another person for the life of the feoffor : (*id.* pl. 344.)

Q.—A. contracts to hold Blackacre to the use of B. to the use of C. What is the effect of such a limitation, and what are the respective interests of B. and C. resulting therefrom ?

A.—If A. merely contracts to hold Blackacre to the use of B., to the use of C., A. will retain the legal estate ; B. therefore will take nothing under the contract, and C. will have an equitable interest. For the mere contract of A. does not divest him of the legal estate, but an absolute conveyance is required for that purpose ; unless, indeed, this contract amounts to a covenant to stand seised, in which case B. will take the legal and C. the equitable estate : (1 Steph. Com. 333, 491 ; Will. Real Pro. 165, 4th edit.)

Q.—What is a power appendant ?

A.—A power appendant is where the use or estate to be created by the power takes effect in possession during the continuance of an estate which the donee hath in possession or remainder, and therefore wholly or partially overreaches it ; as in the instance of the power usually reserved in settlements to tenants for life to make leases : (2 Hughes Pract. Sales Real Pro. 75, 76, 2nd edit.)

Q.—What are powers in gross ?

A.—Powers in gross are where the person in whom they are vested has an estate in the lands, but the estate to be created under the power is not to take effect until such estate is determined ; such is the power of jointuring commonly inserted in marriage settlements : (2 Hughes Pract. Sales Real Pro. *ubi supra.*)

## PROPERTY REAL AND PERSONAL.

*Question.*—Define the several kinds of property according to the English law ?

*Answer.*—Property is divided by Blackstone into two kinds ; things *real* and things *personal* ; which is now designated as real and personal property.

*Q.*—What is the difference between real and personal property ?

*A.*—*Real* property consists of such objects as are fixed, permanent and immoveable, which cannot be carried out of their place, as lands and tenements. *Personal* property consists of goods, money, and all other moveables, which may attend the owner's person wherever he thinks proper to go : (2 Bla. Com. 16 ; 1 Steph. Com. 156 ; 1 Will. Real Pro. 6, 7, 4th edit.)

*Q.*—What do corporeal hereditaments consist of ?

*A.*—They consist wholly of substantial and permanent objects ; all which may be comprehended under the general denomination of land only : (see Will. Real Pro. 13, 14, 4th edit. ; 1 Steph. Com. 159.)

*Q.*—What are incorporeal hereditaments ; and state the several sorts ?

*A.*—An incorporeal hereditament is a right issuing out of a thing corporeal (whether real or personal), or concerning or annexed to, or exercisable with the same, as a rent issuing out of lands or houses, or the like. Advowsons, commons, ways, offices, franchises, pensions, annuities and rents are all incorporeal hereditaments : (1 Steph. Com. 159 ; Will. Real Pro. 10, 195, &c., 4th edit.)

*Q.*—How are corporeal and incorporeal hereditaments respectively conveyed ?

*A.*—Corporeal hereditaments were anciently conveyed by feoffment with livery of seisin ; but incorporeal property, if it was required to be transferred as a separate subject of property, was always conveyed, in ancient times, by writing, that is, by deed, for formerly all legal writings were in fact deeds. Property of an incorporeal kind was said to lie in *grant*, whilst corporeal property was said to lie in livery. But the act to amend the law of real property (8 & 9 Vict. c. 106) now provides that all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery : (s. 2.) There is, accordingly, now no practical difference in this respect between the two classes of property : (see Will. Real Pro. 195, 196, 4th edit. ; 1 Steph. Com. ch. 17.)

*Q.*—What are chattels personal ?

*A.*—Chattels personal are, strictly speaking, things moveable, which may be attendant on the owner's person wherever he thinks proper to go. Such are animals, household stuff, money, jewels, corn, garments, and everything else that can properly be put in motion and transferred from place to place : (2 Bla. Com. 387 ; 1 Steph. Com. 263 ; Will. Real Pro. 6, 4th edit.)

*Q.*—What is a chattel real ?

*A.*—Chattels real are such as savour of the realty, as terms for years of land, or incorporeal hereditaments, the next presentation to a church, estates by *elegit*, or the like. They are called real chattels, as being interests issuing out of, or annexed to, real estates, of which they have one quality, viz., immobility, which denominates them *real*; but want the other, viz., a sufficient legal indeterminate duration; and this want it is that constitutes them *chattels*: (2 Bla. Com. 316; 1 Steph. Com. 262, &c.; Will. Real Pro. 8, 9, 4th edit.)

*Q.*—When is real estate considered as personal, and personal as real?

*A.*—Real estate articted, conveyed, or devised to be sold and turned into money, is reputed as money; and money articted or bequeathed to be invested in real estate is considered as real estate, and descendible and divisible as such: (Story's Eq. Jur. § 790; Smith's Man. Eq. Jur. 186, 3rd edit.)

*Q.*—State concisely the meaning of the terms *intercommon*, and *common of estovers*.

*A.*—*Intercommon* is where the commons of two adjacent manors join, and the inhabitants of both have immemorially fed their cattle promiscuously on each other's common. *Common of estovers* is a liberty of taking necessary wood for the use or furniture of a house or farm from off another person's estate, and may be claimed by grant or prescription: (1 Steph. Com.; Holth. Law Dict. 2nd edit.) or by copyholders by custom.

*Q.*—What is a rent-seck?

*A.*—A rent-seck (*redditus siccus*), a dry or barren rent, so called because no distress could formerly be made for it. But now the statute 4 Geo. 2, c. 28, s. 5, gives a remedy by distress for rent-seck, in the same manner as rent reserved upon lease: (Will. Real Pro. 270, 4th edit.; 2 Steph. Com. 26.)

*Q.*—What is the extreme period for which a person can bring an action to recover land or rent?

*A.*—By the stat. 3 & 4 Will. 4, c. 27, no person can make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or bring such action first accrued to the person making or bringing the same: (sect. 2.) If at the time the right accrues the person entitled to make an entry, &c., is under the disabilities of infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas, then he, or the person claiming through him, has ten years after the disability has ceased to do so: (sect. 16.) But no entry, distress or action can be made or brought after *forty years* next after the time at which such right first accrued: (sect. 17.) And only six years' arrears of rent can be recovered after it becomes due, or next after an acknowledgment of the same in writing has been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent (see Sug. Real Pro. Stats. 16, 71, 133) under this act; but by the 3 & 4 Vict. c. 42, where the rent is secured by an instrument under seal, twenty years' arrears can be recovered: (see Brown's Real Pro. Stats. 61, 62.)



**Q.**—If real estate be purchased out of partnership funds, is it treated as real or personal estate in any and what respects?

**A.**—Real estate bought and held for the purposes of the partnership, as a part of the stock in trade, will be considered in equity, although not at law, as personal estate to all intents and purposes, whatever may be the form of the conveyance, so as to be subject to all the equitable rights and liabilities of the partners and their creditors; and so as to pass to the personal representatives and distributees on the death of a partner, except, perhaps, where there is a clear and determinate expression of the deceased partner that it shall go to his heir-at-law beneficially: (see Story's Eq. Jur. § 674, 1207; Smith's Man. Eq. Jur. 20, 147, 3rd edit.)

**Q.**—What is a chose in action, and to what description of property is it applied?

**A.**—A *chose in action* is a phrase which is sometimes used to signify a right of bringing an action, and at others the thing itself which forms the subject-matter of the right, or with regard to which that right is exercised; but it more properly includes the idea of the thing itself, and the right of action as annexed to it. The description is applied to debts, as money due on bond: for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law; so, in the case of a breach of covenant or contract, the recompense for the damage is a chose in action: (see Holth. Law Dict. 2nd edit.; 2 Steph. Com. 11, 2nd edit.)

**Q.**—Can a chose in action be legally assigned, or by what mode is the transfer of such property effected?

**A.**—A chose in action cannot (with the exception of bills of exchange and other negotiable instruments) be assigned at law; but such assignments are recognised in equity. The form of assigning a chose in action is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. Therefore, when a debt or bond is said to be assigned over, it must still be sued for in the original creditor's name, the person to whom it is transferred being rather an attorney than an assignee. But the assignee cannot sue for it in equity, unless the assignor refuses to allow the assignee to sue for it at law in his name, or has done, or intends doing, some act to prevent the assignee from recovering at law in the assignor's name: (2 Steph. Com. 39, 2nd edit.; Story's Eq. Jur. § 1040, 1057 a; Smith's Man. Eq. Jur. 4th edit.)

**Q.**—What is a rent-charge, and how created?

**A.**—A rent-charge arises on a grant by one person to another of an annual sum of money payable out of certain lands, in which the grantor may have any estate. For this purpose a *deed* is absolutely necessary; for a rent-charge, being a separate incorporeal hereditament, cannot, according to the general rule, be created or transferred in any other way, unless indeed it be given by will: (Will. Real Pro. 270, 271, 4th edit.; see also 1 Steph. Com. 251.)

**Q.**—If certain lands be conveyed to a purchaser, and no notice be taken in the conveyance of any buildings upon, or mines or minerals under the land, would such mines and minerals pass to the purchaser? State any legal maxim applicable to that question.

**A.**—If lands are conveyed to a purchaser, and no notice taken in the conveyance of the buildings upon, or the mines and minerals under, they

will pass to the purchaser ; for the ownership of land carries with it everything above and below the surface, the maxim being *cujus est solum, ejus est usque ad cælum*: (Will. Real Pro. 14, 4th edit. ; 1 Steph. Com. 158.)

*Q.*—Suppose A. grants a piece or pool of water to B., what is the extent of B.'s estate therein?

*A.*—On the grant of a certain piece of water the right of fishing passes, but not the soil : (1 Steph. Com. 162, 3rd edit.) But the word "pool" includes not only the water but the land on which it stands : (Co. Litt. 5 b.)

*Q.*—Should the direction to sell an estate be absolute or discretionary in order to constitute an equitable conversion of freehold into personalty ?

*A.*—The direction to sell must be absolute in order to constitute an equitable conversion of freehold into personalty : (6 Jur. 658, 775.)

*Q.*—State the principal distinctions in the mode of the devolution of real and personal estate on the death of the owner intestate ?

*A.*—Real estate, on the death of the owner intestate, devolves on his heir-at-law, but personal estate is distributed among the next-of-kin, according to the Statute of Distributions.

## TITHES AND ADVOWSONS.

*Question.*—Of what do great and small tithes consist ; and what is a *modus*, and what a tithe rent-charge ?

*Answer.*—Great tithes consist in general of corn, peas, beans, hay and wood ; small tithes consist of all other predial, together with personal and mixed tithes. Tithes are great or small, according to the nature of the things which yield the tithe, without reference to the quantity. Thus, clover grass made into hay is of the nature of all other grasses made into hay, and consequently is a great tithe ; but, if left for seed, its nature becomes altered, and like other seed it becomes a small tithe : (Holth. Law Dict. 2nd edit. ; 3 Steph. Com. 78, 3rd edit.) A *modus* is a composition for tithes, which has existed from time immemorial ; that is, when, by custom or prescription, a particular mode of tithing has subsisted different from that authorized by the general law : (Holth. Law Dict. ; 3 Steph. Com. 80, 3rd edit.) A tithe rent-charge is a payment in lieu of tithes on the land being discharged from the same under the Tithe Commutation Act : (Steph. *ubi sup.*)

*Q.*—Is a rent-charge payable to the rector or vicar under the Tithe Commutation Act fixed, or does it vary ; and if it varies, how is the amount to be ascertained ?

*A.*—A rent-charge payable to the rector or vicar under the Tithe Commutation Act varies with the price of corn : (Will. Real Pro. 285, 4th edit.) The amount is ascertained by the government average of

wheat, &c., as published in the *London Gazette*, for the last seven years: (see 6 & 7 Will. 4, c. 7; Will. Real Pro. *sup.*; 3 Steph. 134.)

**Q.**—Where, under the Tithe Commutation Acts, tithes have been merged by an owner in fee simple of both the tithes and the land out of which they are issuing, and he afterwards sells the land as tithe or rent-charge free, must he deduce his title to the tithes?

**A.**—In course of time, the acts to facilitate the extinguishment of tithes by merger will make the title to the estate the title to the tithes also, but still it will be necessary to resort to the grant from the Crown: at present, however, though the tithes should be extinguished under the acts, the early title to them must be produced: (Sug. Vend. & Pur. Concise View, 267.)

**Q.**—What are advowsons; how severally defined or denominated?

**A.**—An advowson is a perpetual right of presentation to a church or ecclesiastical benefice. Advowsons are of two kinds—*appendant* and *in gross*. An advowson appendant means an advowson which is appendant or annexed to a manor, so that, if the manor were granted to any one, the advowson would go with it as a matter of course. An advowson in gross is where it is severed from the manor to which it was appendant. Advowsons are also either presentative, donative or collative: (see Holth. Law Dict. 2nd edit.; 3 Steph. Com, 65, 3rd edit.; Will. Real Pro. 279, 4th edit.)

**Q.**—If an advowson descends to coparceners, how and by whom is the presentation to a living to be made?

**A.**—The oldest sister is entitled to present alone upon the first vacancy, and so on, according to seniority: (Burton's Comp. pl. 1243; 1 Steph. Com. 322.)

**Q.**—If two or more persons are seised of an advowson as joint tenants, how and by whom is the presentation to be made?

**A.**—Joint tenants before partition ought to join in presentation; but the bishop may accept the presentation of any of them as made on behalf of the rest: (Burton's Comp. pl. 1244.)

**Q.**—An advowson is mortgaged in fee—the incumbent dies; who has a right to present, the mortgagor or mortgagee? Give the reason why the right of presentation is in the one or the other.

**A.**—The mortgagor is entitled to present, because in equity the mortgagor is considered the real owner: (Coote's Mortgages, 33, 3rd edit.)

**Q.**—What length of title should be shown to an advowson? and state the reasons for your answer.

**A.**—The title to an advowson should be carried back one hundred years. The reason for requiring the title to go so far back is, that the stat. 3 & 4 Will. 4, c. 27, enacts that the time for bringing an action of *quare impedit* to recover any advowson shall be during which three clerks in succession shall have held the same adversely to the claimant (sect. 30); and that no action shall be brought after the lapse of one hundred years from the time at which the clerk obtained possession adversely to the right of the claimant: (sect. 33; Browell's Real Pro. Stats., 49, 50, 51; Will. Real Pro. 371, 4th edit.)

**Q.**—In what cases, and in favour of what persons, are covenants to resign a living legal?

*A.*—When the patron is entitled to the advowson as his private property, he may, by the statute 9 Geo. 4, c. 94, present any clerk, under a previous agreement with him for his resignation in favour of any one person named, or in favour of one of two persons, each of them being by blood or marriage an uncle, son, grandson, brother, nephew, or grand-nephew of the patron, or one of the patrons, beneficially entitled. One part of the instrument by which the engagement is made must be deposited within two calendar months in the office of the registrar of the diocese, and the resignation must refer to the engagement, and state the name of the person for whose benefit it is made : (see Will. Real Pro. 279, 280, 4th edit.)

### EMBLEMENTS.

*Question.*—What is the meaning of the term “ emblements ? ”

*Answer.*—Emblements are various vegetables, which, although they are affixed to the soil, are deemed personal property, and on the death of the owners of the land go to the executor, and not to the heir. Those vegetables only which are raised annually by labour and manurance (which are considerations of a personal nature), are called *emblements*. The appellation *emblements*, properly speaking, signifies the profits of sown land, but in a larger sense it extends to roots planted or other *annual* artificial profit ; it includes corn growing, hops, saffron, hemp, flax, and every other yearly production in which art and industry must combine with nature : (Holth. Law Dict. 2nd edit. ; Will. Real Pro. 25, 325, 4th edit. ; 1 Steph. Com. 248, 3rd edit.)

*Q.*—What change has recently been made in the law with respect to claims for emblements, where tenancies determine by the death of the landlord, such landlord being tenant for life ?

*A.*—By the 14 & 15 Vict. c. 25, s. 1, it is enacted, that on the determination of a lease or tenancy of a farm at rack rent by the death, or by the cesser of the estate, of a landlord entitled for life or any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy the lands until the expiration of the then current year of his tenancy. The succeeding landlord to be entitled to recover a fair proportion of rent for this period ; and all the benefits, terms, restrictions, &c., to apply between him and the tenant which existed between the latter and the preceding landlord ; no notice to quit to be necessary to determine the holding and occupation aforesaid : (Will. *supra* ; Steph. *supra*.)

*Q.*—D. is a rector, and has sown part of the glebe land with wheat, and dies before harvest time ; to whom will this crop belong, and what is such crop denominated ?

*A.*—The crop will belong to his executors, and is called emblements. But if the successor be inducted before severance, he shall have tithe thereof : (Matthews' Guide to Exors. & Admors. 31, 2nd edit.)

*Q.*—Tenant for life sows land in his own occupation, and dies before the crop can be severed. Who is entitled to such crop, and what is such crop called? And suppose the tenant for life had leased the land, not under any express leasing power, and the lessee had sown it, what would be the consequence to the lessee?

*A.*—The executors of the tenant for life will be entitled to the crop. Such crop is called *emblements*. If the tenant for life had leased not under a power, and the lessee had sown, the lessee would be entitled to the crop as emblements: (Will. Real Pro. 25, 4th edit.; 1 Steph. Com. 248, 250, 276, 3rd edit.) The 14 & 15 Vict. c. 25, s. 1, has made an alteration in regard to a lessee of a tenant for life or other uncertain interest, by enabling such tenant, on the determination by death or cesser of the estate of any landlord entitled for life, &c., to hold over until the expiration of the then current year's tenancy (paying rent) instead of taking emblements: (see *supra*.)

## COPYHOLDS.

*Question.*—What are copyhold estates, and their most common incidents?

*Answer.*—Copyhold estates are estates holden by copy of court roll; that is, the muniments of the title to such estates are *copies* of the *roll* or book in which an account is kept of the proceedings in the *court* of the manor to which the lands belong. For all copyhold lands belong to, and are parcel of, some manor. An estate in copyhold is not a freehold; but, in construction of law, merely an estate *at the will of the lord* of the manor, at whose will copyhold estates are expressed to be holden. Copyholds are also said to be holden according to the custom of the manor to which they belong, for *custom* is the life of copyholds. Their common incidents are fines, rents, suits, services, &c.: (see Will. Real Pro. 287, &c., 4th edit.; 1 Steph. Com. 206, 3rd edit.)

*Q.*—Explain the origin of copyholds, and by what statute was the further creation of manors prohibited?

*A.*—The copyhold tenure sprang up from the tenure of *villanage*. Under the Saxon government there were a sort of people in a condition of perfect servitude. On the arrival of the Normans, strangers to any other than a feudal state, their position was somewhat raised; they were admitted to the oath of fealty, and called *villeins*. They held their land at the mere will of the lord. In process of time these villeins gained ground on the lords, and in particular strengthened their tenures to that degree that they came to have in them an interest in many places as good, and in others better, than their lords. For the goodnature and benevolence of many lords of manors, having time out of mind permitted their villeins and their children to enjoy their possessions without interruption in a regular course of descent, the common law, of which custom is the life, now gave them title to prescribe against their lords, and, on performance of the same services, to hold their lands in spite of any determination of their lord's will. For though in general they were

still said to hold their estates at the will of the lord, yet it was such a will as was agreeable to the custom of the manor, evidenced by the rolls or immemorial usage. And as such tenants had nothing to show for their estates but those customs and admissions in pursuance of them, entered on these rolls, or the copies of such entries witnessed by the steward, they now began to be called *tenants by copy of court roll*, and their tenure itself a *copyhold*.

The further creation of manors was prohibited by the statute, *Quia emptores*, 18 Edw. 1 : (1 Steph. Com. 206, *et seq.* 3rd edit.; Will. Real Pro. 287, 4th edit.)

**Q.**—What is the meaning of “copyhold—fine arbitrary” as descriptive of the tenure of blackacre? and what is the practical effect of such tenure?

**A.**—A fine due in respect of copyholds is said to be arbitrary when the sum payable depends upon the will and pleasure of the lord or other person having a right to assess it. But it has been from a very early period restricted by the courts of law to bounds of moderation. Two-years’ improved value of the land has been in practice decided to be a reasonable fine on alienation or descent, and no more is allowed to be taken except under particular circumstances: (1 Steph. Com. 213, 604, 3rd edit.; Will. Real Pro. 295, 4th edit.)

**Q.**—In the case of a purchase of copyhold property, what acts are required to vest the estate in the purchaser?

**A.**—The property must be *surrendered* to the lord, <sup>to the use of the lord</sup> who regrants them to the alienee, who is <sup>thereon</sup> subsequently admitted: (see Will. Real Pro. 280, 4th edit.; 1 Steph. Com. vol. 1; Prideaux’s Conv. 88, 2nd edit.)

**Q.**—By what assurance or assurances does a copyholder pass his estate to a purchaser or mortgagee, and is there any and what difference in the form of assurance to a purchaser or mortgagee?

**A.**—A copyholder passes his estate to a purchaser by surrendering it to the lord, who regrants it to the purchaser, and <sup>to the use of the lord</sup> his title is afterwards completed by his admittance as tenant to the lord. A mortgage of copyholds is effected by surrender, in the same manner, from the mortgagor to the use of the mortgagee and his heirs, subject to a condition, that on payment by the mortgagor to the mortgagee of the money lent, together with interest, on a given day, the surrender shall be void. The mortgagee is, however, seldom admitted, unless he should wish to enforce his security: (see Will. Real Pro. 4th edit.; Steph. Com. vol. 1.)

**Q.**—Suppose a purchased estate to be copyhold, at whose expense is the surrender to, and also the admission of, the purchaser?

**A.**—In the absence of any express stipulation, the purchaser is liable to the payment of the expense of the surrender and of his own admittance, and the fine payable thereupon: (see Sug. Vend. & Pur. Concise View, 420.)

**Q.**—If the vendor contract to surrender and assure a copyhold estate at his own expense, is he bound to pay the lord’s fine?

**A.**—No; the title is perfected by the admittance, and the fine is not payable till afterwards: (see Sug. *ubi sup.*)

**Q.**—A., being a surrenderee of copyhold estate, but not admitted, assigns his interest to B. Is the lord compellable to admit B. on payment of a single fine? and how would the case stand if instead of a surrender to A. there had only been a covenant to surrender?

**A.**—A surrenderee of copyhold estate, although not admitted, has such an equitable interest as is capable of assignment, and the lord may be compelled to admit accordingly: (see *Garland v. Aston*, 31 L. T. Rep. 237; *Doe v. Tofield*, 11 East, 246, 251; Steph. Com. vol. 1; 2 Hughes Pract. Sales, 21, 2nd edit.) As to whether a double or single fine will be payable will depend upon circumstances. If the surrender has been courted, then A. must be admitted and complete his title, before he can pass a complete title to B., and in such case a double fine would be due. But if the surrender has never been courted, it may be wholly disregarded, and A.'s vendor may surrender anew to B., who may get admitted; and as fines are only due on admission, the lord will be entitled to but one fine: (see hereon Co. Cop. s. 56; Burton's Comp. pl. 1263, *et seq.*; Hughes Pract. Sales, 29, 2nd edit.) If there had only been a covenant to surrender to A., and he assigns that interest to B., B. may call upon A.'s vendor to surrender to him, and of course only one fine is due, as there is only one admittance: (see Steph. Com. vol. 1.)

**Q.**—Is there any mode by which a testator seised of copyhold estate, and intending that they should be sold after his decease, can avoid the necessity of the admittance of the trustees of his will, and the payment of a fine by them before a sale can be effected; and if so, how?

**A.**—Instead of devising the copyhold estate to trustees to sell, the will should contain a direction that the estates should be sold by the trustees, as by so doing the purchaser will be at once admitted, and the fine and expense of the admittance of the trustees will be avoided. This remark, however, is only applicable where the copyholds are to be sold immediately after the testator's death: (Allnutt's Pract. Wills & Adms. 22, 3rd edit.; Prideaux's Conv. 99, 2nd edit.)

**Q.**—A devisee of copyhold estate dies without being admitted. Will a devise by him operate to pass it, and under what authority?

**A.**—A devisee of copyhold estate is empowered to devise his interest, although not admitted, by the 1 Vict. c. 26, s. 3: (Will. Real Pro. 312, 4th edit.; Steph. Com. vol. 1; Burton's Comp. pl. 1289 n.)

**Q.**—Of what tenure will an allotment under an inclosure act, made in respect of copyhold estate, be, supposing the act to be silent in this respect? *Freehold. Because a copy is not a creature of law but of fact, and must have been created by deed, and not be created by any act.*

**A.**—An allotment made under an inclosure act to the owner of a customary estate, in respect of his right of common appendant, will not be of copyhold or customary tenure, unless so provided in the act: (see Burton's Comp. pl. 1258 n; Co. Litt. 58 b.)

**Q.**—To whom, in the absence of any special custom to the contrary, belong the timber and minerals upon and under the waste land of a copyhold manor, and to whom the timber and minerals under copyhold lands?

**A.**—The lord is entitled to the timber and minerals upon and under the waste lands of a copyhold manor, and also the timber and minerals upon and under the copyhold land. But, as to the copyhold land, the lord cannot come upon it to work the mines or to cut the timber without the tenant's consent: (see Will. Real Pro. 292, 4th edit.; Steph. Com. vol. 1.)

**Q.**—Can a court of equity make a decree for partition of copyhold estate as of freehold, and under what authority?

**A.**—A court of equity may make a decree for the partition of copyhold estate, under the authority of the statute 4 & 5 Vict. c. 35, s. 85.

Q.—Describe how copyholds are conveyed *inter vivos*. The like as to customary freeholds.

A.—The legal estate in copyholds passes by surrender and admittance (see *ante*); customary freeholds are conveyed in some cases by deed and admittance instead of by surrender; in others, by bargain and sale: (Burton's Comp. pl. 1283; Will. Real Pro. 294, note, 4th edit.)

Q.—Can the lord "approve" part of the waste lands of the manor; and, if so, under what law, and to what extent, and subject to what restrictions, if any?

A.—Under the statute of Merton (20 Hen. 3, c. 4), every lord may inclose or "approve" any part of the wastes, provided he leave a sufficiency of common for the tenants: (1 Steph. Com. 621, 2nd edit.; Arch. L. & T. 343, 2nd edit.)

Q.—Can copyholds be entailed; and by what means, and how barred?

A.—The statute *De donis* does not apply to copyholds; therefore, unless there is a custom to that effect, copyholds cannot be entailed. In manors in which there is no custom to entail, a gift of copyhold estate to a man and the heirs of his body will give him an estate analogous to a fee simple conditional, which a freeholder would have acquired under such a gift before the passing of the statute *De donis*. Before he has issue he will not be able to alien; but after he has issue he may alien at pleasure: (see Will. Real Pro. 299, 4th edit.; Burton's Comp. pl. 1284; Steph. Com. vol. 1.) An estate tail in copyhold is barred by surrender: (3 & 4 Will. 4, c. 74, s. 50; Browell's Real Pro. Stats.; Will. Real Pro. 301, 4th edit.; Steph. Com. vol. 1.)

Q.—State the mode of barring legal and equitable estates tail in copyhold lands, and the mode in which a protector of a settlement may give his consent to a copyholder barring his estate tail whether legal or equitable.

A.—The 3 & 4 Will. 4, c. 74, s. 50, enacts that a disposition under this act, by a copyhold tenant having the legal estate, is to be made by surrender; but if his estate is an estate in equity only, then the entail may be barred either by surrender or deed: (sect. 50.) But the surrender or deed requires no enrolment, except an entry on the court-rolls of the manor: (sect. 54.) If the protector consents by deed, such deed must, either at or before the surrender is made, be executed by the protector and produced to the lord of the manor, or to his steward or deputy; otherwise the consent is void, and the deed is to be indorsed by the lord or his steward, acknowledging the production, which deed and indorsement are to be entered on the court-rolls. If the consent of the protector is not given by deed it must be given to the person taking the surrender, barring the entail; and if the surrender is made out of court, the memorandum of surrender must state the consent and be signed by the protector, which must be entered on the court-rolls of the manor: (see sects. 51, 52 & 53, and references *sup*.)

Q.—Explain in a familiar manner the services rendered in respect of copyholds, and to whom; and the reasons for the general discontinuance and commutation of such services into money payments?

A.—The services rendered in respect of copyholds were rendered to the lord of the manor, and consisted of fines, heriots, rents, reliefs, and customary services; also the lord's interest in the timber growing on the copyhold lands. The reasons for their discontinuance were, that they



were found inconvenient to the copyhold tenant, and without any sufficient corresponding advantage to the lords: (Will. Real Pro. 306, 4th edit.)

**Q.**—Can the lord of a copyhold manor be compelled to enfranchise? If so, in what cases and by whom; and how are the expenses of the enfranchisement to be borne?

**A.**—By the 15 & 16 Vict. c. 51, it is provided that any time after the next admittance to any lands *on or after* the 1st July, 1853, either the lord or the tenant may compel enfranchisement. The expense of the enfranchisement is to be borne by the party requiring it: (see sects. 1, 30.) The 21 & 22 Vict. c. 94 (which repeals sects. 2, 11 and 27 of the 15 & 16 Vict. c. 51) makes new provisions for compulsory enfranchisement. It enacts that any lord or tenant of any lands, to which the last admittance took place *on or before* the 1st of July, 1853, may compel enfranchisement; but as to the tenant, before he is in a position to do so, he must pay or tender such a fine, &c., as would be due on admittance, or death after the above date; and he must also pay two-thirds of such sum as the steward would have been entitled to for fees in respect of such admittance: the tenant may then give notice to the lord, or his steward, that he wishes to enfranchise. If the lord wishes to enfranchise, he must also give notice of his intention to the tenant. The consideration to be paid to the lord for such enfranchisement (unless agreed to the contrary) is to be ascertained, under the direction of the Copyhold Commissioners, upon a valuation to be made as pointed out by the act, to which the student is referred. The effect of it, however, is that when the rights to be computed consist of heriots, &c., at fixed rates, or if the land be rated at the poor-rate at less than 20*l.* per annum, the valuer is to be appointed by justices at petty sessions held in the division in which the manor is situate; but in other cases by valuers, one appointed by the lord, the other by the tenant. The commissioners have power to award enfranchisement on the terms of the valuation, and may confirm the same, which confirmation is to have the effect of a deed of enfranchisement under the provisions of the copyhold acts. The consideration may be charged upon the land, as may also the expenses, and be discharged by periodical payments, the expenses covering a period not exceeding fifteen years; and the charges so made are to be a first charge on the land, having priority over all charges, mortgages, and incumbrances whatsoever, except tithe commutation rentcharges, and charges for drainage under the statute for that purpose. This act is to be read with the other Copyhold Acts.

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### DOWER, FREEBENCH AND CURTESY.

**Question.**—What is dower?

**Answer.**—It is an estate for life which the law gives the widow (married before the 1st Jan. 1834) in a third part of all the lands and tenements of which her husband was solely seised in fee simple or fee tail, in possession, at any time during the coverture, and which lands any issue which she might have had might, by possibility, have inherited: (see Will. Real Pro. 190, 4th edit.; 1 Steph. Com. 249. As to dower since 1834, see 3 & 4 Will. 4, c. 105.)

**Q.**—Is the title to dower, since the act for amendment of the law relating to dower, enlarged, and in what instances?

**A.**—Yes; as to women married since the 1st Jan. 1834, for by stat. 3 & 4 Will. 4, c. 105, the widow is entitled to dower out of equitable as well as legal estates of inheritance in possession (not being an estate in joint tenancy); she is also entitled to dower out of lands to which the husband has a right of entry or action, although he has not had the legal seisin. But, on the other hand, women married since the 1st Jan. 1834, are not entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will, and all partial estates and interests, and all charges created by any disposition or will of the husband, and all debts, incumbrances, contracts and engagements to which his lands may be liable, shall be effectual as against the right of his widow to dower. The husband may also, either wholly or partially, deprive his wife of her right to dower by any declaration for that purpose made by him, by any deed, or by his will: (see Will. Real Pro. 193, 194, 4th edit.; 1 Steph. Com. tit. "Dower.")

**Q.**—What is the difference between common law dower, and dower as regulated by the 3 & 4 Will. 4, c. 105?

**A.**—At common law, if, at any time during the coverture, the husband became solely seised of any estate of inheritance, to which any issue which the wife might have had might, by possibility, have been heir, she, from that time, became entitled, on his decease, to have one equal third part of the same lands allotted to her, to be enjoyed by her in severalty during the remainder of her life. This right, having once attached to the lands, adhered to them, notwithstanding any sale or devise which the husband might make. It consequently became necessary (and, as to women married before the 1st Jan. 1834, still is) for the husband, whenever he wished (or wishes) to make a valid conveyance of his lands, to obtain the concurrence of his wife, for the purpose of releasing her right to dower. As to women married after the 1st Jan. 1834, the stat. 3 & 4 Will. 4, c. 105, has granted a right to dower out of equitable as well as legal estates of inheritance in possession, excepting, of course, estates in joint tenancy; the widow is also dowable out of lands to which the husband had a right merely under this act, but no widow is entitled to dower out of lands which have been absolutely disposed of by the husband in his lifetime, or by his will. And all partial estates, and interest and charges created by the husband, and all debts, incumbrances, contracts and engagements to which his lands may be liable, shall be effectual as against the widow's right to dower. The husband may also bar her right to dower, either wholly or partially, by any declaration for that purpose made by him, by any deed, or by his will. Where the husband devises any land to his wife, out of which she would have been dowable, she shall not be entitled to dower out of any land, unless a contrary intention appear. But no gift or bequest of *personal* estate, or of land not liable to dower, shall prejudice the wife's right to dower, unless a contrary intention be declared by the will: (see sects. 2 to 10; Will. Real Pro. 190, *et seq.* 4th edit.; Sugd. Real Pro. Stats. chap. 3; 1 Steph. Com. tit. "Dower.")

**Q.**—If A., on the sale of his estate, covenant for quiet enjoyment against all persons claiming by, from, or under him, would a claim of dower by his mother come within the covenant?

A.—Under such a covenant as the foregoing, a claim of dower by A.'s mother would not come within it, for she does not claim "by, from, through, or under" A. : (see Sug. V. & P., Conc. View, 461.)

Q.—By what means, in a conveyance of freeholds, would you bar the dower of the wife of a purchaser married before the 1st Jan. 1834; and by what means would you bar it, if the purchaser married after that date?

A.—The mode of barring the dower of the wife of a purchaser, married before 1st Jan. 1834, is to give him, first, a general power of appointment by deed; and in default of, and until such appointment, the land is then given to him for life, and, after the determination of his life interest by any means in his lifetime, a remainder (vested) is limited to a trustee and his heirs during the purchaser's life. This remainder is then followed by an ultimate remainder to the heirs and assigns of the purchaser for ever; under these limitations the wife's right to dower cannot attach, for the purchaser has not at any time during his life an estate of inheritance in possession: (see Will. Real Pro. 252, 253, 4th edit.) If the purchaser was married after the 1st Jan. 1834, all that is necessary is to insert in the purchase deed a declaration that the purchaser's widow shall not be dowable out of the lands: (3 & 4 Will. 4, c. 105, s. 6; Will. *ubi sup.*; Steph. Com. *ubi sup.*)

Q.—What was the form of conveyance of freeholds of inheritance, to prevent the attachment of the purchaser's wife's dower, before the statute of William the Fourth? Is it now ever necessary, and in what cases?

A.—There must have been the usual limitations to trustees to bar dower, and it was also usual to insert an express declaration in the conveyance that the purchaser's wife should not be dowable. And this form must still be used if the purchaser was married prior to the 1st Jan. 1834; as the statute of William the Fourth only applies to purchasers married after that date: (see *supra.*) For a form of conveyance see 2 Hughes Pract. Sales Real Pro. No. 1, Appendix.

Q.—What is the difference between jointure and dower; and how is the former constituted, and how does the latter arise?

A.—Jointure is an estate for the life of the wife, to take effect immediately after her husband's death, and arises by the express contract of the parties, and is in lieu of dower. Dower (at common law) is an estate for the life of the wife in a third part of the lands and tenements of which the husband was seised in fee simple or fee tail in possession, at any time during the coverture, and of which any issue which she might have had might, by possibility, have been heir, and arises by operation of law: (see Will. Real Pro. 190, 192, 193, 4th edit.; 1 Steph. Com. 249, 255.)

Q.—What is the effect of a jointure upon dower, when the instrument creating the jointure does not contain the common stipulation, that the jointure is to be in lieu of dower?

A.—It will still bar the widow's right to dower in equity on the implied intention of the parties: (see Sug. Real. Pro. Stats. 256. 257.)

Q.—Is the widow of a tenant in tail, who died without issue, entitled to dower? Would the widow's right, if any, be affected, and how, if her deceased husband had been tenant in tail after possibility of issue extinct?

A.—The widow of a tenant in tail will be entitled to dower, although he died without issue. It is not necessary that issue should be *actually*

*born* to entitle the wife to dower; it is sufficient if the wife might have had issue who might have inherited: (Will. Real Pro. 191, 4th edit.) If the husband was only tenant in tail, after possibility of issue extinct, issue could not possibly have been born; therefore, his widow will not be entitled to dower: (Will. *ubi sup.*; 1 Steph. Com. 251.)

Q.—What is freebench, and how does it arise?

A.—Freebench is that estate in copyhold lands that a wife has after the death of her husband for her dower, according to the custom of the manor. It only arises by custom: (see Will. Real Pro. 321, 4th edit.; Holth. Law Dict. 2nd edit.)

Q.—What is the distinction between freebench and dower?

A.—The distinction between freebench and dower is, that freebench is a widow's estate in such lands as her husband *died seised of*; whereas dower (at common law) is the estate of the widow in all lands of which the husband was seised during the coverture: (see Holth. Law Dict. 2nd edit.)

Q.—A., having married after the Dower Act (3 & 4 Will. 4, c. 105), purchased, and was duly admitted to, copyhold lands, and by a deed executed by him declared that his widow should not be entitled to dower out of such copyhold lands. Will the widow be barred of her customary dower out of such copyhold lands by such deed?

A.—The declaration against the dower of the widow out of the copyhold lands, since the Dower Act, would be inoperative, as that act does not affect copyholds, the freebench in which is generally subject to the husband's power of disposition: (see Sug. Real Pro. Stats. 259.)

Q.—What is a tenancy by the curtesy of England?

A.—Where a man marries a woman seised of an estate of inheritance, and has by her issue, born alive, capable of inheriting her estate; in this case he shall, on the death of his wife, hold the lands for his life as *tenant by the curtesy of England*: (see Holth. Law Dict. 2nd edit.; Will. Real Pro. 185, 4th edit.; 1 Steph. Com. 246.)

Q.—What are the requisites to establish the husband's right as tenant by the curtesy of England?

A.—There are four requisites necessary to make a tenancy by the curtesy:—1. Marriage, which must be legal. 2. Seisin of the wife, which must be an actual one, not a bare right to possess, but a seisin in deed. 3. Issue, born alive during the life of the wife, and capable of inheriting as heir to the wife. 4. Death of the wife: (see 1 Steph. Com. 247, 248; Will. Real Pro. 185, 186, 4th edit.)

Q.—Is there any and what exception as to such tenancy with respect to any and what lands in any particular county in England?

A.—By the custom of gavelkind the husband has a right to his curtesy whether he has had issue or not; but the curtesy in gavelkind lands extends only to a moiety, and ceases if the husband marries again: (Will. Real Pro. *ubi sup.*)

Q.—To entitle a husband to curtesy is it necessary that the issue should be next heirs of the wife?

A.—Yes; it is necessary that the issue should be capable of inheriting as heir to the wife. Thus, if the wife is seised of lands in tail male, the birth of a daughter only will not entitle the husband to be tenant by the curtesy; for the daughter cannot inherit such estate as heir to her mother: (see Will. Real Pro. *ubi sup.*; 1 Steph. Com. *ubi sup.*)

**Q.**—How may dower and curtesy respectively be barred ?

**A.**—As before seen, dower may be barred by taking the property subject to dower uses, or by declaration; it may also be barred by the husband's treason, or by a dissolution of the marriage, or by the widow detaining the title deeds. It may be destroyed by the widow releasing her right to dower, or by accepting jointure. Curtesy may be barred by reason of the marriage not being properly solemnized, or by a dissolution of the marriage : (see references *sup.*)

## VOLUNTARY SETTLEMENT OR CONVEYANCE.

**Question.**—What is understood by the term voluntary settlement ? In whose favour and on what grounds may it be set aside ?

**Answer.**—A settlement is said to be voluntary when it is made without a consideration. It may be set aside in favour of a subsequent *bonâ fide* purchaser for value, or the creditors of the party if he was indebted at the time : (see 13 Eliz. c. 5 ; 27 Eliz. c. 4 ; 1 Hughes Pract. Sales Real Pro. 223, *et seq.* 2nd edit. ; Prideaux's Conv. 532, 533, 2nd edit.)

**Q.**—What are the different kinds of considerations to support a voluntary conveyance or settlement ?

**A.**—It must be a valuable consideration, *i. e.*, money or money's worth ; marriage is a valuable consideration. But the consideration known as a good consideration will support a voluntary settlement or conveyance as between the parties themselves : (Story's Eq. Jur. § 425.)

**Q.**—Is a voluntary settlement good against a purchaser or mortgagee for a valuable consideration with notice of such settlement ?

**A.**—The settlement is void as against a purchaser for valuable consideration, although he has notice of it : (see Sug. V. & P. Conc. View, 566 ; Story's Eq. Jur. *ubi sup.* ; Prideaux's Conv. *ubi sup.* ; Smith's Man. Eq. 85, 3rd edit.)

**Q.**—In what case can a settlement made after marriage upon a wife and children be set aside ? (a)

**A.**—If the settlement be made in pursuance of articles entered into *prior* to the marriage, it will be as binding and conclusive as if made before marriage, and cannot be set aside in favour of purchasers or creditors, for marriage is a valuable consideration : (Hughes' Pract. Conv. 601 ; Prid. *ubi sup.*) But, if the settlement is not made in pursuance of articles entered into previous to the marriage, it is a mere voluntary settlement, and may be set aside in favour of creditors to whom he was indebted at the time he executed the settlement, and also in favour of *bonâ fide* purchasers for valuable consideration ; and it makes no difference whether the purchaser had or had not notice of the settlement : (13 Eliz. c. 5 ; 27 Eliz. c. 4 ; Hughes, *sup.* ; Prid. *sup.*) But care must be taken to distinguish between a mere voluntary conveyance, and one taken in the name of ~~the~~ purchaser's wife and children, the latter of which is not considered to be within the meaning of the 27 Eliz. c. 4, and therefore cannot be defeated by a subsequent *bonâ fide* purchaser for valuable consideration : (Sug. V. & P. Conc. View, 567.)

(a) Also asked in the following manner :—**Q.** If the owner of an estate convey it in trust for the benefit of his wife and family, and then sell it, is the purchaser entitled to it ? If so, is there any exception to the rule ?

## LEASES.

*Question.*—What is a lease, and state the general particulars belonging to it?

*Answer.*—It is properly a conveyance of any lands or tenements (usually in consideration of rent or other annual recompense) made for life, for years, or at will, but always for a less time than the lessor has in the premises; for, if it be for the whole interest, it is more properly an assignment of a lease: (2 Bla. Com. 317; 1 Steph. Com. 475; Arch. L. & T. 2nd edit.)

*Q.*—Give the outline of an ordinary lease for twenty-one years of a private dwelling-house in London.

*A.*—After the date, parties, and demise of the premises, the habendum for the term, the redendum of the rent (except while premises are uninhabitable by reason of fire) clear of all rates and taxes, come the covenants by lessee to pay rent and taxes (except land-tax); and to paint and repair (except in case of fire); to surrender at the end of term; and not to suffer any trade to be carried on. Power to lessor to enter to view the premises and give notice of repairs; and a proviso for re-entry on nonpayment of rent or breach of covenant. Also a covenant by lessor for quiet enjoyment on payment of rent and performance of covenants. Power for either party to determine lease at the end of a given number of (generally seven or fourteen) years. A covenant to insure (by lessor or by lessee, as agreed) is generally inserted, and sometimes the lessor covenants for renewal. The lessee also frequently covenants not to assign or underlet without licence. A schedule of fixtures is generally appended: (see Arch. L. & T. 63, 2nd edit.; Prideaux's Conv. 346, &c., 2nd edit.)

*Q.*—Show the outline of an ordinary farming lease for seven years?

*A.*—After the date, parties, demise, habendum and redendum, follow reservations of timber, underwood, rights of entry, way, sporting, &c. Covenants by the tenant to pay rent and taxes; to keep in repair buildings, gates, hedges, watercourses, &c.; and to cultivate in a husbandlike manner; restrictions against converting pasture into tillage, or sowing or planting flax, &c., under penalty of an additional rent; and against selling or removing dung or compost; and against assigning or underletting. Covenants to pay stated damages for waste, &c. Powers of re-entry for the landlord on bankruptcy or insolvency of the lessee, or on non-payment of rent or breach of covenant. These are the ordinary terms, but special covenants are often requisite: (see Arch. L. & T. 65, 2nd edit.; Prideaux's Conv. 361, 2nd edit.)

*Q.*—State the general outline of a lease of a house, as to such covenants and conditions as would be proper between landlord and tenant in respect of repairs, and payment of rent in case of premises being destroyed by fire.

*A.*—There should be a condition in the redendum that no rent shall be payable whilst the premises are uninhabitable by reason of fire; the land-tax should also be excepted out of the rates and taxes payable by the tenant; and the covenant by the tenant to paint and repair it, should also contain an exception in case of fire.

*Q.*—State the usual covenants in the assignment of a lease?

*A.*—The covenants in the assignment of a lease usually run thus, viz.:—

that the lease is valid; that all outgoings, such as rent and taxes, have been paid, and all covenants and conditions performed; that the vendor has good right to assign, for quiet enjoyment, freedom from incumbrances, and for further assurance. The covenants on the part of the purchaser are to pay rent and perform the covenants reserved in the lease, and to save the assignor harmless therefrom: (1 Hughes Pract. Sales Real Pro. 544, 2nd edit.; Prideaux's Conv. 97, &c. 2nd edit.)

**Q.**—What estate passes by signing and sealing an agreement for a lease?

**A.**—If it appears from the express words of the agreement, or from the indefiniteness of some of its stipulations, to have been the intention of the parties that the lessee should not take possession of the land until the execution of a more formal instrument, no legal estate is created until that is effected, although the agreement is sealed as well as signed: (see Arch. L. & T. 60, 2nd edit.)

**Q.**—Is a lessee under the usual covenants to repair, and to pay rent, liable to pay rent whilst the buildings are uninhabitable by reason of fire until they are rebuilt, and is there any, and what, exception or relief to such liability?

**A.**—If a lessee covenants to pay rent during the term, without any proper exceptions, it must be paid, notwithstanding the premises are accidentally burnt down during the term: (Story's Eq. Jur. § 102.)

**Q.**—Is a lease forfeited if the covenant to insure be broken one year, though the insurance be effected in subsequent years?

**A.**—Equity would not formerly relieve against a forfeiture incurred by breach of a covenant to insure, as the compensation could not, it was said, be estimated in damages; (Adams on Eq. 109; Story's Eq. Jur. § 1320-1326.) But acceptance by the lessor of rent due after breach of covenant of this kind, with notice, would have waived the forfeiture: (see *Price v. Worwood*, 33 L. T. Rep. 149; Arch. L. & T. 103, 106, 2nd edit.) But now by the 22 & 23 Vict. 35, it is provided that equity shall have power to relieve upon terms against a forfeiture, for breach of a covenant to insure, if no loss by fire has happened, and the breach has been committed through accident or mistake, and without fraud or gross negligence; and the premises are at the time of the application insured in accordance with the covenant: (sect. 4.) If relief be granted, an indorsement on the lease, or otherwise, is to be made to that effect: (sect. 5.) But the court cannot relieve the same person, in respect of the same covenant, more than once; nor can the court grant relief if <sup>the</sup> forfeiture <sup>under the court</sup> has already been waived out of court: (sect. 6; see also sects. 7-9.)

**Q.**—If, in a lease, the lessee covenant to keep the premises in repair, except damage by fire, or some particular repairs, can he compel the lessor to do the excepted repairs without an express covenant on his part for the purpose?

**A.**—The lessee cannot compel the lessor to do the excepted repairs without an express covenant for the purpose: (see Arch. L. & T. 279, 2nd edit.; 1 Hughes' Pract. Sales Real Pro. 520, 2nd edit.)

**Q.**—Is the assignee of a lease to any and what extent liable to the original lessor under the covenants of the lessee?

**A.**—Whenever a covenant is annexed to the demised property, and so forming a covenant running with the land, it will be binding on the assignee, so long as he remains in possession. Thus, he will be bound by a covenant to pay rent and taxes, or to keep the demised premises in

repair: (see Will. Real Pro. 331, 4th edit.; 1 Hughes Pract. Sales Real Pro. 522, 2nd edit.; Arch. L. & T. 74, 2nd edit.; and see Sug. Conc. V. & P. 444, 445.)

Q.—How does such liability of the assignee of the lessee differ from the liability of the lessee's executor?

A.—The executors or administrators of a lessee are only bound when they have assets: (1 Hughes Pract. Sales Real Pro. 521, 2nd edit.; and see 22 & 23 Vict. c. 35, s. 27.)

Q.—What difference is there between the liability of the lessee and the liability of the lessee's assignee in regard to breaches of covenant?

A.—The lessee is liable on his express covenants during the whole continuance of the term, notwithstanding any assignment which he may make; but the assignee is only liable for such covenants as run with the land, which may be broken during the time that the term may be vested in him, and not after he has assigned it over to another person: (see Will. Real Pro. 230, 231, 4th edit.; Arch. L. & T. 75, 2nd edit.; Prideaux's Conv. 2nd edit.)

Q.—Is a sub-lessee to any and what extent liable to the original lessor under the covenants of the lessee in the original lease?

A.—The under-lessee is not liable to the original lessor under the covenants of the lessee in the original lease: between the under-lessee and the original lessor no *privity* is said to exist; he is tenant to the lessee and not to the original lessor: (see Will. Real Pro. 336, 4th edit.; Arch. L. & T. *sup.*; Prideaux's Conv. *sup.*)

Q.—What is a tenancy for a term of years; and what is the lessee when he enters by force of the lease?

A.—When the lease is made, the lessee does not become complete tenant to the lessor until he has entered on the lands let. Before entry he has no estate, but only a right to have the lands for the term by force of the lease, called, in law, an *interesse termini*. But, if the lease should be made by a bargain and sale, or any other conveyance operating by virtue of the Statute of Uses, the lessee will have the whole term at once vested in him, in the same manner as if he had actually entered: (Will. Real Pro. 329, 4th edit.; and see 1 Steph. Com. 268, 476; Arch. L. & T. 61, 2nd edit.) — *When he enters by force of the lease he becomes tenant. Will. Real Pro. p. 105. § 357*

Q.—What estate must a person have to enable him to make a lease by which the lessee may derive a present tenancy and occupation?

A.—He must have an estate in possession.

Q.—If a remainder man, *not* in possession, (a) makes a lease, what estate or interest would the lessee derive under it?

A.—If a remainder man, not in possession, makes a lease, the lessee will have a future *interesse termini*. The remainder man will be bound by estoppel, and when his estate comes into possession, the lease will take effect: (see Will. Real Pro. 329, 4th edit.; and see Arch. L. & T. 61, 2nd edit.)

Q.—Can a tenant for life, in possession, make a lease to continue beyond his life; and, if so, under what circumstances, so as to be good against those in remainder?

A.—A tenant for life cannot make a lease to 'endure beyond his own life, unless he is especially empowered to do so by the deed under which he holds, in which case the lease will be good against those in remainder:



(Will. Real Pro. 25, 4th edit.) Also, by the Leases and Settled Estates Act, it is provided that every person in possession of any settled estate for his life, or years determinable with his life, or for any greater interest in his own right, or in right of his wife (unless there is an express declaration to the contrary in the settlement); and also any person entitled, in possession, to any unsettled estate as tenant by the curtesy or in dower, or in right of a wife seised in fee, without any application to the Court of Chancery, may lease the estate (except the principal mansion and the demesnes and lands usually occupied therewith) for twenty-one years. But this power only extends to settlements made after the 1st Nov. 1856, and the lease must be by deed, to take effect in possession, and at the best rent that can be reasonably obtained, without fine, impeachable for waste, and is to contain all other usual covenants. The leases made by virtue of this act are binding against those in remainder: (see 19 & 20 Vict. c. 120, ss. 32, 33, Brickdale's edit.; Lord St. Leonard's Handy Book.)

**Q.**—If joint tenants make a demise, what tenancy has the lessee; and what tenancy has he, if the demise is by tenants in common?

**A.**—Joint tenants have but one freehold; and, therefore, in leases granted by them, the demise by, reservations to, and covenants with them, are made precisely in the same manner as when the lease is granted by a sole owner, the plural number being substituted for the singular. But tenants in common have several freeholds; consequently, a lease granted by them operates as a separate demise of his share: (4 Jarman's Conv. by Sweet, 236.) And joint tenants may sever in making leases: (see Arch. L. & T. 11, 2nd edit.)

**Q.**—What leases can infants make, and what tenancy has the lessee?

**A.**—Leases by infants are not void, but they are voidable on their attaining their majority. Consequently, the infant may either confirm or avoid the lease on attaining his majority. Accepting rent, *after* he is of full age, is a confirmation of the lease: (Arch. L. & T. 3, 2nd edit.)

**Q.**—What tenancy has a lessee from an idiot or lunatic; and to have a secure tenancy for the term, what course should be adopted; and by what means can idiots and lunatics surrender and renew leases?

**A.**—An idiot or lunatic cannot make any effectual disposition of his property. But the committee of the estate of such lunatic (which term extends to idiots, &c.) is empowered, under the direction of the Lord Chancellor, to grant leases, according to the lunatic's interest in the land, for such term as the Lord Chancellor shall direct. And where any lunatic shall become entitled to any lease, it shall be lawful for his committee, by the direction of the Lord Chancellor, to surrender such new lease, and take, in the name and for the benefit of the lunatic, a new lease for the term originally granted by the surrendered lease: (11 Geo. 4 & 1 Will. 4, c. 65; 1 Hughes Pract. Sales Real Pro. 505, 2nd edit.; Arch. L. & T. 6, 2nd edit.; see also 19 & 20 Vict. c. 120.)

**Q.**—Mortgagor and mortgagee: what separate right has each to lease the mortgaged premises; and what would be the lessee's tenancy holding a lease from the one without the concurrence of the other?

**A.**—A mortgagor cannot grant a lease that will be binding on the mortgagee unless under a power or authority; for all leases or other interests in land created by the mortgagor subsequently to the mortgage are absolutely void as against the mortgagee, who may treat the tenants

under such leases, or persons claiming such interests, as wrongdoers and trespassers. Neither can the mortgagee make a lease so as to be binding on the equity of redemption, unless in pursuance of a leasing power conferred upon him: (1 Hughes Pract. Sales Real Pro. 501, 502, 2nd edit.; Arch. L. & T. 12, 2nd edit.; Will. Real Pro. 352, 4th edit.)

Q.—A. makes a mortgage to B., and afterwards agrees to grant a lease to C.; by whom should the lease be granted?

A.—The mortgagor cannot make a lease so as to bind the mortgagee, nor can the mortgagee make a lease so as to bind the equity of redemption, unless in pursuance of a leasing power conferred upon him. Therefore, the mortgagor, to make a valid lease, should procure the latter to concur in the lease: (Coote on Mortgages, 334, 3rd edit.; Arch. *ubi sup.*; Will. *ubi sup.*)

Q.—If A., tenant in fee simple, make a lease of lands to B., to have and to hold to B. for term of life, without mentioning for whose life it shall be, what shall it be deemed, and why?

A.—It will be deemed an estate for the life of B.; for an estate for a man's own life is more beneficial and of a higher nature than for another's life; and the rule of law is, that all grants are to be taken most strongly against the grantor: (Co. Lit. 42 a.)

Q.—Must all executors join in assigning a leasehold interest?

A.—It is not necessary that all executors should join in assigning a leasehold interest; as all the executors who prove the will have a joint and several interest: (Arch. L. & T. 11, 12, 2nd edit.; Burton's Comp. pl. 931.)

Q.—Can a tenancy from year to year, created by parol, be surrendered by parol?

A.—No. Even a parol tenancy from year to year cannot be surrendered by mere word of mouth: (1 Hughes Pract. Sales Real Pro. 73, 2nd edit.)

Q.—For what length of time is a tenancy, by parol, binding without a written agreement?

A.—The term must not exceed three years from the making thereof, and the rent reserved must amount at least to two-thirds of the full improved value of the land. If the lease is for a longer period, or at a lower rent, it must be by deed: (29 Car. 2, c. 3; 8 & 9 Vict. c. 106; Will. Real Pro. 326, 4th edit.; 1 Steph. Com. 476.)

Q.—Is there any, and, if any, what distinction between a tenancy at will and a tenancy from year to year?

A.—Yes; for either party, landlord or tenant, may determine a tenancy at will at his own pleasure: (Co. Lit. 55, but see *post.*) But as to a tenancy from year to year, both landlord and tenant are entitled to notice before the tenancy can be determined by either of them. This notice must be given at least half a year before the expiration of the current year of the tenancy; for the tenancy cannot be determined by one only of the parties, except at the end of any number of whole years from the time it began: (Will. Real Pro. 325, 326, 4th edit.)

Q.—Does the surrender of an original lease affect an under lease? and give a reason for your answer.

A.—In order to the effectual surrender of an original lease, it is neces-



Q.—Where a tenancy is for a term of years certain, is any, and what, notice to quit necessary?

A.—When a lease is determinable on a certain event, or at a particular period, no notice to quit is requisite, as both parties are equally apprised of the determination of the term: (*Right v. Darby*, 1 T. R. 162; Arch. L. & T. 220, 2nd edit.)

Q.—In a tenancy from year to year is any, and what, notice to quit necessary?

A.—Yes; notice must be given at least half a year before the expiration of the current year of the tenancy: (Will. Real Pro. 325, 326, 4th edit.; Arch. L. & T. 221, 2nd edit.)

Q.—If a tenancy continue after the expiration of a lease, without any new agreement, on what terms does the tenant hold?

A.—He is a tenant at sufferance only: (Will. Real Pro. 325, 4th edit.; 1 Steph. Com. 273.)

Q.—What is a tenancy at sufferance? *It has been defined as "the law estate which can subsist" and*  
 A.—A tenancy at sufferance is where a person has originally come into possession by a lawful title, and holds such possession after his title has determined: (Will. Real Pro. 325, 4th edit.; 1 Steph. Com. 273.)

Q.—What is a tenancy at will? *It may be defined to be an estate determinable at the will of the landlord.*

A.—A tenancy at will arises when a person lets lands to another, to hold at the will of the lessor or person letting: (Will. Real Pro. 325, 4th edit.) But every estate at will is at the will of both parties, landlord and tenant, so that either of them can determine it at his pleasure: (Co. Lit. 55.) But what was formerly considered a tenancy at will has been much modified by subsequent decisions, and is now often construed as a tenancy from year to year.

Q.—What are the remedies of landlords for the recovery of possession from tenants at sufferance? *Action of Trespass.*

A.—Where the term or interest of any tenant holding under a lease or agreement in writing of any lands, tenements, or hereditaments for any term or number of years certain, or from year to year, shall have expired, or been determined either by the landlord or tenant by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made and signed by the landlord or his agent, and served personally upon, or left at the dwelling-house or usual place of abode of, such tenant or person, and the landlord shall thereupon proceed by action of ejectment for the recovery of possession—at the foot of the writ in ejectment may be addressed a notice to such tenant or person, requiring him to find bail, if ordered by the court or judge: (see 15 & 16 Vict. c. 76, s. 213; Arch. New C. L. Pract. 294, 295, 2nd edit.; and see *ante*, pp. 110, 111.)

Q.—Where a lessor brings an action of ejectment for non-payment of rent reserved by lease, for want of sufficient distress on the premises, and obtains judgment and possession under an execution, can the lessee obtain relief at law or in equity?

A.—The tenant may obtain relief in equity, if he applies within six calendar months next after the execution of the judgment on the ejectment, and on payment of all arrears of rent and full costs: (see 15 & 16 Vict. c. 76, s. 210; Will. Real Pro. 202, 4th edit.)

**Q.**—State the principal covenants on the part of the lessee which should be contained in a building lease of land in a town, to be granted by a freeholder.

**A.**—Covenants to pay rent and taxes ; to build (according to the agreement) ; to repair ; to paint ; to insure in joint names of lessor and lessee, and to surrender at the end of term. The lease should also contain powers of entry for the lessor to view the premises, and give notice of repairs, and powers of re-entry on non-payment of rent, or non-performance of covenants. These are the principal and usual covenants, but special covenants are often necessary, as to construct sewers and roads, or to bear a portion of the expense thereof.

## MORTGAGES.

**Question.**—What is a mortgage ?

**Answer.**—A mortgage (*mortgagium*, from *mort*, death, and *gage*, pledge) may be described to be a conveyance of lands by a debtor to his creditor, as a pledge or security for the repayment of a sum of money borrowed. The debtor who so makes the conveyance of his lands, or so puts them in pledge, is termed the *mortgagor*, and the creditor to whom the lands are so conveyed as a security for the money lent, is termed the *mortgagee*. Mortgages are of two sorts : either the lands are conveyed to the mortgagee and his heirs in fee-simple, with a proviso that, if the mortgagor pays the money borrowed on a certain day, the mortgagee will reconvey the lands ; or else the lands are conveyed to the mortgagee, his executors, administrators and assigns for a long term of years, with a proviso that if the money borrowed is repaid on a certain day the term shall cease and become void : (Holth. Law Dict. 2nd edit. ; 1 Steph. Com. 282 ; Will. Real Pro. 349, 4th edit.)

**Q.**—What is the difference between the *vivum vadium*, or living pledge or mortgage, and the *mortuum vadium*, or dead pledge or mortgage ?

**A.**—The *vivum vadium*, or living pledge, is when a man borrows a sum of money of another (suppose 200*l.*) and grants him an estate, as of 20*l.* *per annum*, to hold till the rents and profits shall repay the sum borrowed ; in this case the land or pledge is said to be *living* ; it subsists and survives the debt, and immediately on the discharge of that reverts back to the borrower : (Holth. Law Dict. 2nd edit.) The *mortuum vadium*, or dead pledge, is where lands are conveyed by one to another as a security for money lent, either in fee or for a term, with a condition that if the money be repaid on a certain day, with interest, the lands shall be re-conveyed to the borrower, and with a further proviso, that if default shall be made in repayment of the money, the person lending the money shall hold the lands without any interruption from the borrower. The person who conveys the land is termed the mortgagor, and the person who lends the money, and to whom the land is conveyed, is termed the mortgagee : (Will. Real Pro. 349, *et seq.* 4th edit. ; Coote on Mortgages, 4, *et seq.* 3rd edit. ; 1 Steph. Com. *ubi sup.*)

Q.—What is the legal distinction between a mortgage in fee and a mortgage for a term of freehold lands ?

A.—One is a freehold, the other only a chattel interest. At law a mortgage in fee is an absolute conveyance to a man and his heirs, subject to an agreement for a reconveyance on a certain given event ; the mortgagee having the legal estate in fee-simple vested in him by the conveyance, and the only interest remaining in the mortgagor is the equity of redemption (Will. Real Pro. 349, *et seq.*), whilst a mortgage for a term is only a chattel real. They are more preferable in one respect than a mortgage of the fee-simple, as on the death of the lender the pledge, as well as the interest in the debt, devolves on his personal representatives : (Burton's Comp. pl. 858.)

Q.—What is required to constitute an equitable mortgage ? *under will.*

A.—An equitable mortgage is created by a deposit of title deeds, with a creditor as security for an antecedent debt, or on a fresh loan of money : (see Story's Eq. Jur. § 1020.) Or by an agreement in writing showing the creditor's intention to make his land or other property a security for the debt : (see Smith's Man. Eq. Jur. 261, 3rd edit.) *b Edit. 299*

Q.—Will the deposit of deeds by way of mortgage, without a deed or written memorandum, be a security ?

A.—Yes ; it constitutes an equitable mortgage : (see *supra* ; and see Will. Real Pro. 358, 4th edit.)

Q.—State briefly the ordinary form and construction of a mortgage deed of real estate.

A.—The parties, recitals, testatum (where, in consideration of the money lent, the premises are granted to the mortgagee) and the habendum ; then follow the proviso for redemption and reconveyance by the mortgagee, on payment of principal and interest, and for mortgagor to enjoy until default ; covenants by the mortgagor to pay principal and interest, to keep the buildings in repair and insured, and the usual absolute covenants for title, and powers of sale on default in paying principal and interest : (see Prideaux's Conv. 2nd edit.)

Q.—If a mortgage for a term of years be made to two persons, and one dies, having appointed a third person his executor, can the surviving mortgagee give a valid receipt for the mortgage debt ; and if not, what provision should be inserted in the mortgage deed to enable him to do so ?

A.—It is a rule of equity, that when money is advanced by more persons than one, it shall be deemed, unless the contrary is expressed, to have been lent in equal shares by each ; such being the case, the executor or administrator of any of the parties would, on his decease, be entitled to receive his share. In order, therefore, to prevent the application of this rule, it is usual to declare, in all mortgages made to trustees, that the money is advanced by them on a joint account, and that in case of the decease of any of them in the lifetime of the others, the receipts of the survivors or survivor shall be an effectual discharge for the whole of the money : (see Will. Real Pro. 360, 361, 4th edit.)

Q.—Sketch the outline of a mortgage in fee from A. to B., C. and D., who are trustees of the money advanced.

A.—After the parties and recitals, follow the testatum and habendum, proviso for redemption and reconveyance, and for mortgagor to enjoy until default. The usual absolute covenants by the mortgagor for title, for payment of principal and interest, to keep premises in repair, to pay

rates and taxes, and to insure, with a power of sale for B., C. and D., or the survivors or survivor of them, or the heirs of such survivor, or their or his assigns, with a declaration that the money is advanced upon a joint account.

Q.—State how the covenants for title on a mortgage and a purchase differ ?

A.—On a mortgage the covenants for title given by the mortgagor are absolute, that is, extending to the acts of the whole world ; whilst those given on a purchase are qualified covenants, being restricted to the acts of the covenantor, or to himself and those through whom he claims by will or descent : (see Will. Real Pro. 369, 4th edit.)

Q.—What are the proper modes of mortgaging freehold, copyhold and leasehold estates ? State each severally.

A.—Freeholds are either mortgaged in fee-simple or for a long term of years ; but they are now more generally mortgaged in fee-simple, as it is more valuable : (Will. Real Pro. 356, 4th edit.) A mortgage of copyholds is effected by surrender (in a similar manner to a purchase), subject to a condition, that on payment by the mortgagor to the mortgagee of the money lent, together with interest on a given day, the surrender shall be void ; the mortgagee, however, is seldom admitted, unless he should wish to enforce his security. In the mortgage of leaseholds the term is assigned by the mortgagor to the mortgagee, subject to a proviso for redemption or re-assignment on repayment of the money lent, with interest, on a given day ; mortgages of leaseholds are, however, frequently made by way of demise or under lease, as by this means the mortgagee is not rendered liable to the landlord for payment of rent and performance of the covenants of the lease : (Will. Real Pro. 356, *et seq.* 4th edit. ; Coote on Mortgages, 108, *et seq.* 3rd edit.)

Q.—In a mortgage of leasehold estate what should be avoided to protect the mortgagee from being liable to the rents and covenants on the lease ?

A.—The mortgage should not be by assignment, but by under lease : (see *supra*.)

Q.—Is it useful, and if so in what respect, to take a bond from a mortgagor in addition to the mortgage and covenant for payment of principal and interest ?

A.—If a debt is secured by the mortgage of real estate and also by covenant, and collaterally by bond, the mortgagee may pursue all his remedies at the same time. If he obtains only part payment on the bond or covenant he may go on with his foreclosure suit, and, giving credit for what he has recovered on the bond or covenant, he may foreclose for non-payment of the remainder. On the other hand, if he obtains a foreclosure suit first, and alleges that the value of the estate is not sufficient to pay the debt, he may sue on the bond or covenant ; but his so doing would open the foreclosure, and the mortgagee would again be entitled to redeem : (see Smith's Man. Eq. Jur. 253, 254, 4th edit. ; and see Coote on Mortgages, 497, 3rd edit.)

Q.—What is an equity of redemption ; and is the party entitled to it for ever, and when barred ?

A.—Equity of redemption is the right which equity gives a mortgagor, or his representatives, of redeeming his mortgaged estate after the appointed period has gone by for payment of the sum of money

which was due on the mortgage : (1 Steph. Com. 293, 3rd edit. ; Will. Real Pro. 353, 4th edit.) A mortgagor's right to the equity of redemption is barred at the end of twenty years from the time the mortgagee has obtained possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, unless in the mean time an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee, or the person claiming through him : (Sug. Real Pro. Stats. 109, 110 ; Browell's Real Pro. Stats. 25, 65.)

Q.—What is meant by tacking a mortgage, and how can this be effected ?

A.—If a third mortgagee, who has made his advance without notice of a second mortgage, can purchase the first legal mortgage, he may *tack*, as it is said, his third mortgage to the first, and so postpone the intermediate incumbrancer ; for in a contest between innocent parties, each having equal right to the assistance of a Court of Equity, the one who happens to have the legal estate is preferred to the others, the maxim being that when the equities are equal the law prevails : (Will. Real Pro. 363, 364, 4th edit. ; Story's Eq. Jur. § 412, 413 ; Coote on Mortgages, 385, *et seq.* 3rd edit. ; Smith's Man. Eq. Jur. 4th edit.)

Q.—Where there are three mortgagees, can the third in any and what manner protect himself against the second ; and will the fact of his having had notice (when he advanced his money) of the second mortgage interfere with such protection ?

A.—A third mortgagee may, by purchasing the first legal mortgage, tack his third to the first, and so postpone the second. But to enable a mortgagee to tack, he must have had no notice of a second mortgage at the *time of advancing his money*, but it will make no difference that the third mortgagee at the *time of purchasing* the first had notice of the second mortgage : (see references *supra*.)

Q.—Will the first mortgagee, on advancing more money and having notice of a mesne mortgage, be entitled to tack the third mortgage against the mesne mortgagee ?

A.—To entitle the first mortgagee to tack he must have had no notice of the other incumbrance at the time of lending his money : (Coote on Mortgages, 417, 3rd edit.) An exception to this rule appears to have existed in a case of mortgage being made to secure the sum then lent, and also future advances, and a second mortgage being afterwards made to another person *with notice of the first*, and further advances being subsequently made by the first mortgagee *with notice of the second* ; in which case it has been held the first mortgagee might tack against the second, because it was folly of the latter to lend his money on such security : (see *Gordon v. Graham*, 7 Vin. Abr. ; Coote on Mortgages. 417, 3rd edit. ; Will. Real Pro. 364, 4th edit.) But this case has been overruled, and it is now decided that you must not in any case have notice, at the time of advancing the money, of the intermediate incumbrance, to entitle you to tack : (see *Rolt v. Hopkinson*, 32 L. T. Rep. 69, 112.) *but not to be appealed. Smith Eq. Jur. 6th ed p 275*

Q.—In a register county, does registration of a second mortgage amount to notice thereof ?

A.—The mere registration of a conveyance is not deemed constructive



notice to subsequent purchasers as to collateral effects, so that the mere registration of a second mortgage will not prevent a prior mortgagee from tacking a third mortgage when he has no actual notice of the existence of a second mortgage: (Story's Eq. Jur. § 401, 402; Coote on Mortgages, 378, 3rd edit.; Smith's Man. Eq. Jur. 82, 3rd edit.; Sug. V. & P. Conc. View, 405.)

*Q.*—Is any notice necessary, and to whom, on taking a mortgage of the equity of redemption?

*A.*—On taking a mortgage of the equity of redemption, it is incumbent on the person lending the money, first, to make inquiry of the prior mortgagee into the amount of his demand; and, secondly, to give him express notice of the proposed mortgage: (Coote on Mortgages, 210, 3rd edit.) However, it is provided by stat. 4 & 5 W. & M. c. 16, that a person twice mortgaging the same lands, without discovering the former mortgage to the second mortgagee, shall lose his equity of redemption: (Coote on Mortgages, 211, 3rd edit.)

*Q.*—Should a second mortgagee take any, and what, precaution so as to have priority over a second charge to the first mortgagee?

*A.*—He should not only give the first mortgagee express notice of the proposed mortgage, but he should also make inquiry of the prior mortgagee into the amount of his demand. And it will be advisable, if the first mortgagee will permit, to put notice of the second mortgage on the principal title deed, such as the conveyance to the mortgagor, or the like: (Coote on Mortgages, 210, 3rd edit.)

*Q.*—A mortgagee in fee dies intestate: in whom do the estate and money vest?

*A.*—As the mortgagee has the legal estate, supposing the mortgage to be of the fee, it will, on his death intestate, descend to his heir-at-law; but in equity, as a mortgage is only considered as a security for the money lent, the personal representatives will be entitled to the money, and the heir-at-law will be compelled to join the personal representatives in conveying the estate, although he will not be entitled to a shilling of the money: (see Will. Real Pro. 354, 4th edit.)

*Q.*—A. is mortgagee in fee and dies without devising the security, and the mortgage debt is applicable by his executor to the payment of the testator's debts; suppose the heir-at-law of the mortgagee to be unwilling or incapable to reconvey the premises, to whom is the mortgagor to pay the principal money and interest, and how is he to obtain an effectual reconveyance of those premises?

*A.*—If the heir-at-law of the mortgagee is unwilling or incapable of reconveying the premises, the way to obtain a reconveyance is to apply to the Court of Chancery for a vesting order under the 13 & 14 Vict. c. 60, which has the same effect as if the heir-at-law of the mortgagee had duly executed a conveyance or assignment of the lands in the same manner &c. for the same estate. If deemed more expedient, a person will be appointed to execute a conveyance to have the same effect. The money must be paid to the executors.

*Q.*—A mortgagee in fee dies intestate as to the land invested in him as mortgagee, leaving an infant heir; can any, and what, steps be taken to obtain a conveyance of the legal estate from the infant heir?

*A.*—Yes; application must be made to the Court of Chancery for an order vesting the estate in the mortgagor, which will have the same

effect as if the infant mortgagee had been twenty-one years of age, and had duly executed a conveyance or assignment of the lands in the same manner and for the same estate : (13 & 14 Vict. c. 60, s. 7.)

**Q.**—A. makes a mortgage to B. in fee ; B. dies intestate : A. then wishes to pay off the mortgage. What assurance, and by whom executed, is necessary for effectually restoring the estate to A. free from the mortgage ?

**A.**—The heir-at-law of the mortgagee must join the administrators in a reconveyance of the mortgaged estate. The reason for this is, that in a court of law the mortgagee is absolutely entitled, and on his death intestate the estate descends to his heir ; but in equity he has only a security for the payment of money, which, like other personal estate, devolves on his executors or administrators, for whom the heir is only a trustee : (Will. Real Pro. 354, 4th edit.)

**Q.**—If a freehold estate in mortgage be devised, is the devisee entitled to have the mortgage paid out of the testator's personal estate, there being no direction in his will to that effect ; and has the law on this point been altered, and when, and in what respect ?

**A.**—By the 17 & 18 Vict. c. 113, it is enacted, “ that where a person shall, after the 31st Dec. 1854, die seised of or entitled to any estate or interest in lands or tenements, and the same shall at his death be charged with the payment of any money on mortgage, and he shall not by his will or deed, or any other document, have signified any contrary intention, the heir or devisee to whom the lands shall descend or be devised shall not be entitled to have the mortgage money paid out of the personal estate.” It is, however, provided that this enactment shall not affect any rights claimed under any deed, will, or other instrument made before the 1st Jan. 1855. Before this act the heir or devisee was, as a general rule, entitled to have the mortgage debt discharged out of the personal estate of the testator or intestate : (Will. Real Pro. 362, 4th edit.)

**Q.**—A. mortgages land, of which he is seised, to B. in fee, for securing the payment of a sum of money covenanted to be paid by A. ; A. afterwards devises the mortgaged land to C. ; is C. entitled to have the mortgage debt discharged out of A.'s personal estate ? (a)

**A.**—C. must take the land charged with the mortgaged debt, and is not entitled to have it discharged out of the personal estate of A., unless A. has by his will shown a contrary intention : (17 & 18 Vict. c. 113, *et sup.*) But it is provided that this act is not to affect any rights claimed under any deed, will, or other document made before the 1st Jan. 1855 : (see Will. Real Pro. 362, 4th edit.)

**Q.**—If mortgage money be not paid at the appointed time, what are the remedies to which a mortgagee may resort ?

**A.**—He may either bring his action of ejectment, or file his bill of foreclosure. And, if it is desired, he may proceed on all his remedies at the same time, both at law and in equity ; he may at the same moment bring his ejectment, file his bill of foreclosure, and proceed on his bond and other collateral securities : (see hereon *ante*, p. 159.) In addition to

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(a) Also asked in this form :—**Q.**—As between the executor and devisee of a testator, who is liable for a mortgage on the land devised made subsequently to the will ? How has the law been lately altered ?

these remedies, there is now usually provided a more simple and less expensive mode of proceeding, by giving to the mortgagee, by the mortgage deed, a power to sell the premises on default in payment: (Will. Real Pro. 355, 4th edit.; Coote on Mortgages, 124, 497, 3rd edit.; Smith's Man. Eq. Jur. 245, 3rd edit.) *the first act does not appear to this, it arises out of the same principle*

Q.—If a person make a distinct mortgage for two different sums on two distinct estates (one of which is of insufficient value) to the same person, can he redeem one of the mortgages without redeeming the other?

A.—In this case the mortgagor will not be allowed to redeem the one that is an ample security without redeeming the other; because he who seeks equity must do equity: (Story's Eq. Jur. § 1023; Smith's Man. Eq. Jur. 251, 3rd edit.)

Q.—Mortgage to A. for 1000*l.*, then to B. for 800*l.*; A. sells his charge to C., a stranger, for 700*l.* Is C. entitled, as against B., to the whole debt of 1000*l.*, or only to the 700*l.* he paid?

A.—On a mortgage to A. for 1000*l.*, then to B. for 800*l.*, if A. sells his charge to C. for 700*l.*, C. is entitled as against B., the second mortgagee, to the whole debt of 1000*l.* He stands in the place of the first mortgagee after the assignment of the debt to him by the first mortgagee. But it is otherwise with respect to heirs, trustees, agents, or executors, as a general rule: (Coote on Mortgages, 303, 3rd edit.; Hughes's Pract. Con. 314, *et seq.*; Smith's Man. Eq. Jur. 259, 3rd edit.)

Q.—A. mortgages freehold estate to B., with power of sale, and then dies. B. then exercises his power of sale, and, after retaining principal and interest, there is a surplus. To whom will the surplus belong, viz., to the heir or personal representatives of the mortgagor?

A.—On a mortgage of freehold estates to B. with power of sale, and B. exercises his power, A. being then dead, the surplus, after retention by B. of his principal, interest and costs, will belong to the heir, and not to the personal representatives of A., for previously to the sale he would have been entitled to the estate, subject, of course, to the mortgage.

Q.—An estate is mortgaged to C. in fee; he enters as mortgagee and then dies, leaving a widow. Is the widow dowable out of this estate?

A.—If an estate be mortgaged to A. and he enter into possession, and die leaving a widow, she is not dowable out of this estate; unless, indeed, all equity of redemption was clearly barred at the husband's death: (Coote on Mortgages, 510, 3rd edit.)

Q.—When will a mortgagee be secure in paying the mortgage money to a person in trade, and subject to the bankrupt laws?

A.—All payments really and *bonâ fide* made to any bankrupt before the date of the fiat, or the filing of a petition, are to be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, providing the person so paying to such bankrupt had not at the time of payment notice of any prior act of bankruptcy by him committed: (12 & 13 Vict. c. 106, s. 133; Sug. V. & P. Conc. View, 121, 574.)

Q.—What covenants is it usual for mortgagees to enter into?

A.—Mortgagees merely covenant that they have done no act to incumber: (2 Hughes Pract. Sales Real Pro. 208, 2nd edit.)

Q.—What is the effect of cancelling or destroying a mortgage deed?

A.—If a mortgagee cancel a mortgage, and it is found so in his possession at his death, it is as much a release as cancelling a bond; but

it does not convey or revest the estate in the mortgagor, for that must be done by some deed : the legal estate, in such a case, descends upon the heir ; but there being no debt at law or in equity, at least upon the mortgagee, the court holds the heir to be a trustee for the mortgagor : (Smith's Man. Eq. Jur. 267, 4th edit.)

*Q.*—Is it legal to take procuration money on a loan of money by mortgage, and how much, and who is entitled to it ; the solicitor for the mortgagee, or the solicitor for the mortgagor ?

*A.*—Yes ; it is legal to take procuration money on a loan of money by mortgage. By 12 Anne, c. 16, 5s. for every 100*l.* is allowed, but more may now be taken : (17 & 18 Vict. c. 90.) The solicitor for the mortgagee is entitled to it.

*Q.*—Can a mortgagee in possession, whose estate is absolute at law, cut down timber ?

*A.*—A mortgagee in possession, whose estate is absolute at law, will not be permitted to waste the estate ; and if he proceed to fell timber, an account will be decreed and the produce applied, first, in payment of the interest, and then in sinking the principal, and equity will enjoin him, unless the security prove defective, in which case the court will not restrain him from felling timber, the produce being of course applied in ease of the estate : (Coote on Mortgages, 367, 3rd edit. ; and see Smith's Man. Eq. Jur. 235, 3rd edit.)

*Q.*—Is a mortgagee with a power of sale justified between himself and the mortgagor in selling by auction, with a condition that he shall be at liberty to rescind the sale in case of any objection to the title which he may be unable or unwilling to remove ; and is a purchaser buying at a low price under such a condition secure against further claims by the mortgagor ?

*A.*—If the power of sale be properly drawn, the mortgagee may sell by auction with such a condition ; for mortgagees are liable to make a good title, just as a seller *sui juris*, and the consent of the mortgagor is not necessary to the sale : (see Sug. V. & P. Conc. View, 44, 47 ; Hughes's Pract. Conv. 348, 349.)

*Q.*—What are the rights of a mortgagee ?

*A.*—The rights of the mortgagee after default are very numerous ; amongst which are the following :—He may evict the mortgagor, or file his bill of foreclosure, or proceed to sell the premises where there is a power to that effect given him by the mortgage deed ; he has a right to tack a third mortgage to a first, where he made the further advance without notice ; he may evict any lessee of the mortgagor's subsequent to the mortgage, and may give the tenant, who was such prior to the mortgage, notice to pay rent, and, in default, distrain ; and he may, if in possession, and the property be of sufficient value, vote at elections and gain a settlement under the poor-laws : (see Smith's Man. Eq. Jur. c. 3, s. 1 ; Coote on Mortgages, 3rd edit.)

*Q.*—Define and explain the nature and effect of attornment ?

*A.*—Attornment is properly the acknowledgment by the tenant of a new lord : (Will. Real Pro. 203, 4th edit.) It is still applicable to the case of a mortgage, for where the mortgage is made after the lease, a mortgagee will not be entitled to the rent under the lease made prior to the mortgage until he shall have given notice to the tenant, and required payment of the rent to himself : (see more fully *ante*, p. 106, 107.)

*Q.*—A., seised in fee, demises to B. for a term in mortgage; A. then mortgages the equity of redemption to C. in fee; A. next pays off B.'s mortgage, and desires to merge B.'s term; how is this to be effected?

*A.*—B. must surrender his term to C.; C. having the next estate of freehold; he, in fact, having the inheritance.

*Q.*—Is there any mode by which a clergyman can mortgage his benefice?

*A.*—Ecclesiastical persons (having the cure of souls) are restrained from *charging* their benefices so as to render them liable to the payment of pension or profit thereout, even in their own time. This is by force of 13 Eliz. c. 20, a statute that was once repealed by the 43 Geo. 3, c. 84, s. 10, but which has been since revived by 57 Geo. 3, c. 99. Under this statute of Elizabeth, it has been held that an instrument framed as a lease, but amounting in substance and design to a charge, is illegal and void; and that not only a direct charge, but an agreement to charge a living, falls under the same consideration: (see 3 Steph. Com. 97, 3rd edit.; Burton's Comp. pl. 219, and note.)

*Q.*—Mention the principal parts of a conveyance in fee by a mortgagor and mortgagee to a purchaser.

*A.*—They are the following:—Parties. Recital of mortgage; of money due on mortgage, and of contract of purchase. Testatum: The mortgagee, in consideration of the mortgage money, and the mortgagor, in consideration of the remainder of the purchase money, convey the estate to the purchaser and his heirs, &c. Habendum: Covenant by mortgagee, that he has not incumbered; covenants by mortgagor for title free from incumbrances, and for further assurance.

If the mortgage was only for a term, which is to be surrendered, the testatum must be varied accordingly, the mortgagee surrendering and yielding up at the request, and by the direction of the vendor, and the vendor grants, &c.: (Jarm. Conv. by Sweet, 3rd edit.; Prideaux's Conv. 2nd edit.)

*Q.*—What remedies for the recovery of his mortgage money does a mortgagee possess who has no power of sale?

*A.*—Formerly, in general, his only remedy would have been to file his bill of foreclosure (Smith's Man. Eq. Jur. 199, 2nd edit.); or sue on his covenant, if one, or to bring his ejectment. But now, by stat. 15 & 16 Vict. c. 86, s. 84, the Court of Chancery is empowered, in any suit for foreclosure, to direct a sale of the property at the request of either party instead of a foreclosure.

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## JUDGMENT AND OTHER DEBTS.

*Question.*—Are freeholds subject to judgment debts, and, if so, what proceedings are necessary thereunder?

*Answer.*—Freeholds are subject to judgment debts; but, before lands in the hands of purchasers, mortgagees, or creditors can be affected, the name, abode and description of the debtor, with the amount of the

debt, damages, costs, or money recovered against him, or ordered by him to be paid, together with the date of registration and other particulars, are required to be registered in an index which the act directs to be kept at the office of the Court of Common Pleas: (1 & 2 Vict. c. 110, s. 19.) This registration must formerly have been repeated every five years (2 & 3 Vict. c. 11, s. 4); but it is now sufficient if the registration be repeated at any time within five years before the conveyance, &c., to the purchaser, &c., or within five years before the right of the creditors accrued: although more than five years shall have expired since the prior registration was made: (see 18 Vict. c. 15, s. 6.) *18 & 19 Vict. c. 23 & 24 of the Act*

Q.—At what time does a judgment operate on land in a register county? and is there any and what difference as to the period of its so doing in Middlesex and Yorkshire?

A.—In Middlesex judgments operate on land from the time they are memorialized: (7 Anne, c. 20, s. 18.) In Yorkshire, in the North Riding, any judgment registered within twenty days after the signing of it, is available in the same manner as if it had been registered on the day it was signed: (8 Geo. 2, c. 6, s. 33.) And in the East and West Ridings, and in Kingston-upon-Hull, thirty days are allowed for the registering of judgments: (5 Anne, c. 18, s. 11; 6 Anne, c. 35, s. 28.) Therefore, where the estate lies in Yorkshire or Kingston-upon-Hull, recent judgments should be searched for in the Common Pleas: (Prideaux's Conv. 72, 73, 2nd edit.)

Q.—When do judgments bind leasehold estates, and where should searches be made as to such incumbrances?

A.—Leasehold estates are now subject to judgments in the same manner as freeholds, with this exception, that, as against purchasers without notice of any judgments, such judgments have no further effect than they had under the old law. And under the old law leasehold estates being chattels merely, were not bound by judgments until a writ of execution was actually in the hands of the sheriff. Search should be made in the Common Pleas Office: (Will. Real Pro. 334, 335, 4th edit.)

Q.—Do judgments against a mortgagee affect the mortgaged estate in the hands of a purchaser from the mortgagor, who pays off the mortgage out of the purchase money; and does notice to the purchaser of the judgment prior to the completion of the purchase, make any difference in such a case?

A.—By the 18 Vict. c. 15, it is provided that where any legal or equitable estate or interest, or any disposing power, in or over any lands, tenements, or hereditaments, shall under any conveyance or other instrument, executed after the passing of this act, become vested in any purchaser or mortgagee for value, such lands, &c., shall not be taken in execution under any writ of *elegit*, or other writ of execution to be sued upon any judgment, or any decree, order, or rule against any mortgagee or mortgagees thereof who shall have been paid off prior to or at the time of the execution of such conveyance; nor shall such judgment, &c., be a charge upon such lands so vested in purchasers or mortgagees: (see sect. 11.) Notice to the purchaser before the completion will not make any difference: (see *Greaves v. Wilson*, 28 L. J. 103.)

Q.—What is the effect of a judgment registered under the 1 & 2 Vict. c. 110, upon freehold and copyhold estate of the debtor at law and in equity; and who are protected by that statute and the statute 2 & 3 Vict. c. 11, against such judgments in equity?

*A.*—The effect of a judgment duly registered, under 1 & 2 Vict. c. 110, is to bind all the lands, &c. (including copyhold and customary-holds) of which the judgment debtor or any person in trust for him is at the time of the entering up of the judgment, or at any time after, seised, possessed, or entitled, or over which he has any disposing power which he may exercise for his own benefit without the assent of any other person. But as against purchasers and mortgagees without notice of any such judgment, such judgment shall not bind or affect any lands, tenements, or hereditaments further or more extensively in any respect, although duly registered, than it would have done under the old law: (sect. 19; 2 & 3 Vict. c. 11; Sug. V. & P. Conc. View, 383, 387.) *See*

*Q.*—When does a judgment at law become a charge on real estate?

*A.*—By the 13th section of the 1 & 2 Vict. c. 110, a judgment is made a charge upon all lands and tenements, &c. (including copyholds and customary-holds) of which the person against whom execution is sued, is, at the time of entering up judgment, or at any time afterwards, seised, possessed, or entitled, &c.: but to affect purchasers, &c., it must be registered: (sect. 19, and references *supra*.) *Person who has property before coming to law will be charged within 3 months*

*Q.*—A. has a decree in Chancery against B. for the payment of a sum of money; how is A. to make that sum a charge upon B.'s estate, and under what authority?

*A.*—If A. has a decree against B. for payment of a sum of money it has the effect of a judgment at law; but to affect lands, &c., in the hands of purchasers, mortgagees and creditors it must be registered in the same manner as a judgment: (1 & 2 Vict. c. 110, ss. 18, 19, and *supra*.)

*Q.*—If a judgment has been entered up against a man seised in fee of lands for a debt, how is such judgment to be enforced?—

*A.*—A writ of *elegit* must be sued out; so called because it was stated in the writ that the creditor had elected (*elegit*) to pursue the remedy the statute (18 Edw. 1) had provided for him: (see Will. Real Pro. 67, 4th edit.)

*Q.*—What is the difference between specialty and simple contract debts?

*A.*—Specialty debts consist of two kinds—either matters of record, such as judgments and the like (recorded in the Courts of Justice); or, *deeds*, that is, contracts under seal. Simple contract debts (or contract without specialty) are such as are not under seal: (1 Steph. Com. 410, 411, 3rd edit.) And in administering legal assets the former have priority in payment over the latter: (see *ante*, p. 7.)

*Q.*—What are assets, and how are they applied for payment of debts?

*A.*—Personal property of a saleable nature in the hands of the executor or administrator, sufficient to make him chargeable to a creditor or legatee, so far as that personal property will extend, are assets. *Assets by descent or real* are lands which are in the hands of the heir charged with the payment of debts contracted by the ancestor, so far as such lands can go in the discharge of those debts: (Holth. Law Dict.) Assets are now generally applied in the following order for the payment of debts: First, the general personal estate. Secondly, any estate particularly devised for payment of debts. Thirdly, estates descended. Fourthly, estates devised to particular devisees, but charged with the payment of debts: (Story's Eq. Jur. § 577.)

**Q.**—If a man die seised of lands, are they liable as against his devisee or heir-at-law for the payment of his debts of both kinds, or either, and which?

**A.**—All estates in fee simple which the owner shall not by his will have charged with or devised subject to the payment of his debts, are now liable to be administered in the Court of Chancery for the payment of all the just debts of the deceased owner, as well debts on simple contract as on specialty: (3 & 4 Will. 4, c. 104.) The lands will therefore be liable to the payment of both simple contract and specialty debts, in the hands of the heir-at-law or devisee: (see Will. Real Pro. 63, *et seq.* 4th edit.)

**Q.**—The stat. 3 & 4 Will. 4, c. 104, renders freehold and copyhold estates liable to the payment of specialty and simple contract debts. Under the statute, are these legal or equitable assets; and is there any class of creditors entitled to be paid their debts before others?

**A.**—Estates rendered liable for the payment of debts by the 3 & 4 Will. 4, c. 104, are equitable assets. But all creditors by special contract, in which the *heirs are bound*, shall be paid the full amount of the debts due to them before any of the creditors by simple contract; or by specialty in which the heir is not bound, shall be paid any part of their demands: (see Will. Real Pro. 65, 66, 4th edit.)

## CONDITIONS OF SALE.

**Question.**—State the conditions, as regards the title and conveyance, proper to be made on the public sale of a freehold estate.

**Answer.**—The mode in which the conditions should be framed will, in many instances, depend upon the particular state of the vendor's title and the evidence by which it is supported. The most usual conditions are the following:—1. That the highest bidder shall be the purchaser (subject to the right of the vendor or his solicitor to bid once); and in case of dispute, to be put up again at the last undisputed bidding. 2. For payment of deposit, &c. 3. That in case of delay by purchaser he shall pay interest. 4. For delivery of abstract of title at vendor's expense within specified period. 5. For delivery of requisitions on the title by the purchaser within a specified period, and that, subject to such requisitions, the title shall be deemed to be accepted. 6. If purchaser objects to title, vendor to be at liberty to rescind the contract on return of deposit without interest. 7. Error in description not to annul sale, but to be made good by compensation. 8. Conveyance to be prepared by and at purchaser's expense. 9. For empowering vendor to resell in case of default by purchaser, and deposit to be forfeited, and loss on resale to be recovered as liquidated damages. Stipulations will, in certain cases, be necessary; as to payment for timber, fixtures, &c.; also where title deeds are retained by vendor, &c.: (see 1 Hughes Pract. Sales Real Pro. 10, *et seq.* 2nd edit.; Prideaux's Conv. 11, *et seq.* 2nd edit.)



A.—It is generally proper in this case, in addition to the general conditions, to provide against the investigation by the purchaser, or, at all events at the vendor's expense, of the freeholder's or lessor's title; and also that the last receipt for ground-rent shall be conclusive evidence that the covenants of the lease have been performed: (Prideaux's Conv. 3, 17, 2nd edit.) *This is the more important as such receipt is usually made by the vendor, the warranty cert. retains a priv. from any breach.*

Q.—Acting as solicitor for a person about to sell an estate, would you take any, and what, preliminary measures regarding the title or conditions of sale?

4.—Before proper conditions of sale can be framed, firstly, the value of property must be ascertained; secondly, the title to the property must be investigated; thirdly, the advertisements must be prepared: (see 1 Hughes' Pract. Sales Real Pro. 3, 2nd edit.)

A.—Conditions that vendor shall not be bound to produce any deeds not in his possession; that in case the purchaser or his solicitor shall object to the title, the vendor shall be at liberty to vacate the sale by notice to the purchaser, and the purchaser to be repaid his deposit money, but without interest, &c.; unless the purchaser shall, within [fourteen] days after the receipt of such notice, agree to accept the title unconditionally (or the vendor may insert a condition that the purchaser shall take the property with such title as he actually possesses); that the purchaser shall bear the expense of the conveyance, and of attested copies, &c.; that any misdescription shall not annul the sale, but to be made good by compensation: (see 1 Hughes' Pract. Sales Real Pro. 10, *et seq.* 2nd edit.)

A.—They cannot be altered by parol, either by adding to, subtracting from, or contradicting anything contained in them: (see 1 Hughes' Pract. Sales Real Pro. 11, 2nd edit.; Sug. V. & P. Conc. View, 12, 113.)

*A.*—To complete the purchase an agreement should be signed by the parties or their agents, because sales by auction of estates are within the Statute of Frauds, and, consequently, the contract could not be enforced against either of the parties who had not signed an agreement. The auctioneer may, however, bind the seller or purchaser by signing for him, being in law his agent for that purpose: (Sug. V. & P. Conc. View, 28.)

A.—The same particulars as detailed in framing conditions; of course varied to meet the different mode of sale. The terms of the contract should be clearly and explicitly set forth; every care should be taken to avoid equivocal expressions, and nothing which it is intended to carry into effect should be left resting merely on parol, as extrinsic evidence is inadmissible in a court of law to vary the terms of a written

contract, and it is only under peculiar circumstances that such evidence will be received in a court of equity : (see *supra*.)

*Q.*—The like question as to leasehold estate.

*A.*—In addition to the usual stipulations, if the vendor is unable to procure his lessor's title, he ought by his contract to provide against the purchaser requiring it, and that the vendor should not be bound to give any earlier title than the original lease ; it may also in many instances be proper to state the terms on which the premises are held: (see 1 Hughes Pract. Sales Real Pro. 44, 45, 2nd edit.; Sug. V. & P. Conc. View, 25, 267 ; Prideaux's Conv. 3.) (*a*)

*Q.*—Can a bidder at a public auction retract his bidding, and, if so, when ?

*A.*—A bidding may be retracted at any time before the lot is actually knocked down ; it should be made in a tone sufficiently loud for the auctioneer to hear : (see 1 Hughes Pract. Sales Real Pro. 52, 2nd edit. ; Lord St. Leonards' Handy Book, 35, 7th edit.)

## VENDOR AND PURCHASER.

*Question.*—What are the ordinary modes or titles by which real estate is acquired ?

*Answer.*—They are by descent, devise, purchase (in its ordinary sense), escheat, curtesy, dower and elegit ; also by bankruptcy and insolvency.

*Q.*—What is the distinction between a title by purchase and a title by descent ?

*A.*—A person is said to acquire his estate by descent when it comes to him by operation of law, as where it descends to the eldest son on the death of the father. If it is acquired in any other manner it is said to be acquired by purchase, as where it is devised by will: (Will. Real Pro. 78, 4th edit.)

*Q.*—What is the difference of construction between a deed and a will ; and why is the difference made ?

*A.*—The law has always allowed a more liberal construction in favour of a will than of a deed ; because, in the exposition of the former, the law has rather inclined to regard the intention of the testator than the precise legal import of the terms he has employed to express it ; wills being so often made when a testator is suffering from sickness, and not unfrequently when he is actually on his death-bed, and unable to obtain that professional assistance of which a party to a deed may generally avail himself. And where two clauses are inconsistent, in a will the latter prevails, in a deed the former : (see 1 Hughes' Pract. Sales Real Pro. 303, 2nd edit.)

(*a*) The answer to the following question may be easily gathered from the foregoing:—On a sale of leasehold estate what conditions ought to be inserted with regard to the title of lessor and lessee, or either, or both ?

**Q.**—Is anything beyond probate of the will necessary in order to perfect the title of a person to whom a leasehold estate (for years) has been given by will ?

**A.**—The assent of the executor is necessary to perfect the title : (see Hughes' Pract. Sales Real Pro. 267, 2nd edit.)

**Q.**—Is the tenant for life, or the remainderman, entitled to the custody of the title deeds ?

**A.**—The tenant for life is entitled to the custody of the title deeds (see Will. Real Pro. 376, 4th edit.) ; at all events when he is clothed with the legal estate ; but the remainderman may, under certain circumstances, apply to have them delivered up : (see Smith's Man. Eq. Jur. 319, 3rd edit.)

**Q.**—If A. claims to be heir-at-law, as eldest son of B., what evidence is necessary to prove the heirship ?

**A.**—Evidence is necessary of the marriage of B., of the baptism or birth, and time or order of birth of A., and of the death or burial of B. The parochial register would be evidence both of the time and fact of the marriage of B., and of his burial. The parochial register of baptisms would be evidence of the birth of A., but not of the time or order of birth, as to which a certified extract from the general register established under 6 & 7 Will. 4, c. 86, and 1 Vict. c. 22, should be obtained. This evidence might be supported by statutory declarations, &c. : (see Dart's V. & P. 196 to 200, 2nd edit. ; Sug. V. & P. 309.)

**Q.**—What was formerly considered a sufficient title to an estate in fee simple ?

**A.**—Sixty years ; and this is still necessary, notwithstanding the 3 & 4 Will. 4, c. 27 ; for though the time within which suits may be instituted is thereby shortened, still another ground of the rule, viz., the duration of human life, is not affected by it ; and the objection to titles on the ground that the conveying parties might have been mere tenants for life, &c. still exists ; whatever, therefore, might have been the intention of the Legislature in passing this Statute of Limitations, it has not led to the result of shortening the period from which titles were to be deduced, and a sixty years' title is still necessary : (*Cooper v. Emery*, 1 Phill. 388 ; Sug. V. & P. Conc. View, 265 ; Will. Real Pro. 370, 4th edit.)

**Q.**—Has any and what change taken place, and by what act or acts, to simplify and shorten titles with reference to length of possession ?

**A.**—No. (See *Cooper v. Emery*, 1 Phill. 388, *et supra*.)

**Q.**—For how many years has a purchaser of a fee-simple estate a right to require the vendor to show a title ? And on what principle is the vendor bound to show a title for the time to be stated in your answer to the first part of this interrogatory ?

**A.**—In framing an abstract the title should be carried back to some document not less than sixty years old ; the duration of human life being considered the origin of that time : (see *supra*.)

**Q.**—Can an agent authorised by parol to purchase an estate at a certain price, bind his principal by his written agreement to buy it for a larger sum ; and if not, has the seller any, and what, remedy against the agent ?

*A.*—An agent cannot bind his principal if he exceeds his authority; he must act within the scope of his authority, and no further; if he bids more for an estate than he is authorised, he will himself become liable to the seller: (see Lord St. Leonards' Handy Book, 24, 25, 7th edit.; Smith's Man. Eq. Jur. 3rd edit.; Sug. V. & P. Conc. View, 82.)

*Q.*—Is a delay occasioned by defects of title which are ultimately removed, a bar to a decree for specific performance at the suit of the vendor; and, if not, what steps should the purchaser take to relieve himself from the contract, if the delay be injurious to him?

*A.*—If time be not originally of the essence of the contract, a delay on account of a defect of title which is ultimately removed will be no bar to a specific performance. But if there is unreasonable delay, the purchaser should, in order to free himself from the contract, give the vendor formal notice that the title is defective, and decline to accept it if the defects are not removed within a specified time, and that if this be not done he will consider the contract rescinded; and if the vendor does not, in accordance with this notice, remove the defects from the title, the purchaser may plead it in answer to a suit for specific performance: (see Story's Eq. Jur. §§ 747, &c., 776, &c.; Smith's Man. Eq. Jur. 187, 3rd edit.)

*Q.*—Can a contract to purchase an estate at a price to be fixed by two valuers (one to be named by each party), or an umpire to be named by the valuers if they differ in opinion, be enforced against a party who refuses to appoint, and, if so, how?

*A.*—Where parties agree upon a specific valuation, as by two persons, one chosen by each, unless the price be fixed as directed, the court cannot enforce performance of the agreement; and neither of the parties to such an agreement can be compelled to nominate an arbitrator or valuer under the agreement: (Sug. V. & P. Conc. View, 203, 204; Story's Eq. Jur. § 1417; Lord St. Leonards' Handy Book, 47, 7th edit.)

*Q.*—On a sale of lands, what expenses are usually borne by the vendor, and what by the purchaser?

*A.*—In the absence of any stipulation to the contrary, the vendor will be bound to defray all the expenses incurred in making out and deducing his title to the property; and also of obtaining the concurrence of the necessary parties, and all the incidental costs attendant upon the execution of the purchase deed; but the expense of the preparation of the purchase deed itself, as also of the stamp and parchment, must be paid by the purchaser: (see 2 Hughes' Pract. Sales Real Pro. 228, 2nd edit.; Sug. V. & P. Conc. View, 172, 318, 320.)

*Q.*—Is it customary for the vendor or purchaser to bear the expense of preparing the abstract of the title to the estate to be conveyed; and which, according to custom, bears the expense of the conveyance?

*A.*—The vendor is bound, at his own expense, to supply a purchaser with an abstract of all the title deeds and documents necessary to support the title. But the purchaser must bear the expense of the preparation of the purchase deed itself, as also of the stamps and parchment: (see 2 Hughes, *supra.*; Sug. V. & P. *supra.*)

*Q.*—At whose expense is the obtaining the execution of the conveyance to the purchaser?

*A.*—The expense attending the execution is borne by the vendor, the deed itself by the purchaser: (see *supra.*)

**Q.**—On payment of purchase money to trustees, what is to be attended to on the part of the purchaser? Is the purchaser of an estate sold, subject to a devise for payment of debts *generally*, bound to see to the application of the purchase money?

**A.**—Where property was devised upon trust for payment of debts and legacies *generally*, the purchaser was not bound to see to the application of the purchase money on payment to trustees: but if such debts were specified and scheduled, or even specifically mentioned, the purchaser would have been responsible for the application of the purchase money: unless the will contained an express clause exonerating purchasers from all responsibility with respect to the application of the purchase money: (see Sug. V. & P. Conc. View, 517 to 523; Story's Eq. Jur. § 1126, *et seq.*) But now the 22 & 23 Vict. c. 35, enacts, that "the *bonâ fide* payment to, and receipt of, any person to whom any purchase or mortgage money shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating this trust or security": (sect. 23.)

**Q.**—When will a purchaser be secure in paying the purchase money to a person in trade, and subject to the Bankrupt Law?

**A.**—All payments really and *bonâ fide* made to any bankrupt before the date of the fiat or the filing of a petition are to be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, providing the person so paying to such bankrupt had not at the time of such payment notice of any prior act of bankruptcy by him committed: (12 & 13 Vict. c. 106, s. 133; Sug. V. & P. Conc. View, 121, 574.)

**Q.**—How is a contract for sale affected by the bankruptcy of the vendor or purchaser? State the law in either case.

**A.**—By the 12 & 13 Vict. c. 106, s. 133, it is enacted that all contracts, dealings and transactions by and with any bankrupt, really and *bonâ fide* made and entered into before the filing of the petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person dealing with the bankrupt had not at the time notice of the bankruptcy. Therefore a contract entered into before bankruptcy, which is *bonâ fide*, is unaffected by the subsequent bankruptcy of the vendor. And by sect. 146 it is provided, that where a person enters into an agreement to purchase land and afterwards becomes bankrupt, the assignees may be required to elect whether they will abide by the agreement or not, and application may be made to the court to order them to deliver up possession of the agreement and premises to the vendor, &c.: (12 & 13 Vict. c. 106, s. 146; Sug. V. & P. Conc. View, 121.)

**Q.**—When does a bankrupt's real estate vest in his assignees?

**A.**—The real estate of the bankrupt (except copyholds), as well as the personal, vests in the assignees, as a general principle, from the act of bankruptcy. The assignees have, it is true, no title till their appointment; but when appointed, their title extends backwards, and relates to the act of bankruptcy: (see Smith's Merc. Law, tit. "Bankruptcy," p. 652, 5th edit.)

**Q.**—What is the effect of bankruptcy on a general power to appoint real estate?

*A.*—By the 12 & 13 Vict. c. 106, s. 147, it is provided, that all powers vested in any bankrupt which he might legally execute for his benefit (except the right of nomination to any vacant ecclesiastical benefice) may be executed by the assignees for the benefit of the creditors in the same manner as the bankrupt, might have executed the same. And by sect. 148, the bankrupt, if he does not try the validity of the adjudication, or if the validity of the adjudication is established by a verdict at law, may be ordered to join in conveyances; and if he does not do so within the time stated in the order, he is estopped from objecting to the validity of such conveyance; and all interest which the bankrupt had therein is as effectually barred by such order as if such conveyance had been executed by him. Before the 6 Geo. 4, the bankrupt was not compellable to execute an absolute power of appointment in favour of his assignees: (*Thorpe v. Goodall*, 17 Ves. 270; see also Hughes' Pract. Conv. 201, 202; Will. Real Pro. 245, 4th edit.)

*Q.*—How does notice of a trust affect a purchaser for valuable consideration?

*A.*—If a purchaser purchase with a notice of the trust he will be bound by it: (see Story's Eq. Jur. § 395.) Unless it be a voluntary trust: (see *ante*, p. 149.)

*Q.*—Who is capable of conveying real estate; and who, in the technical sense of the term, of purchasing?

*A.*—All persons of full age, of sound mind, not being aliens, and not attainted of treason or murder (and even these latter, except as against the King or Lord) may alien their lands. So may a *feme covert*, if her husband join with her, or without if dispensed with; so lay corporations aggregate (except municipal corporations) may alien, but ecclesiastical corporations, whether aggregate or sole, have only a limited power of disposition: (1 Steph. Com. 447, *et seq.* 3rd edit.; Burton's Comp. pl. 188, *et seq.*; 1 Hughes' Pract. Sales Real Pro. 157, *et seq.* 2nd edit.) All persons, and even corporations, may be purchasers of lands, but some of these are partially, and others wholly, incapable of holding the same for their own benefit.

*Q.*—What is a deed; and what are its requisites?

*A.*—A deed is a written instrument under seal. The requisites are, firstly, that there be persons able to contract and be contracted with; secondly, that the deed be written or printed on paper or parchment; thirdly, that the matter be legally and orderly set forth; fourthly, that the party whose deed it is seal it, and in most cases sign it also; fifthly, that the deed be *delivered* by the party or his attorney; and lastly, though not absolutely necessary except where the deed is executed pursuant to a power, that the deed be executed in the presence of witnesses, who should attest the execution; reading is also a requisite, if required: (2 Bla. Com. chap. 20; 1 Steph. Com. chap. 16, 3rd edit.)

*Q.*—Can a deed be altered to any and what extent after it has been executed by all or any of the parties?

*A.*—A deed ought not to be altered at all after execution. An alteration in any material part is sufficient to avoid the deed: (see 1 Steph. Com. 478, 3rd edit.)

*Q.*—How may a deed be avoided?

*A.*—A deed may be avoided by being altered in a material part after execution, without being re-executed: (see 1 Steph. Com. *ubi sup.*)

**Q.**—State concisely the several parts of the ordinary form of a conveyance of freeholds.

**A.**—The technical parts of a deed of conveyance from a vendor to a purchaser are usually the following:—1. The parties. 2. The recitals. 3. The testatum. 4. The parcels and general words. 5. The habendum. 6. The covenants, which are, that the vendor has good right to convey, for quiet enjoyment, freedom from incumbrances, and for further assurance. The deed must also be signed, sealed and delivered, and the attestations and receipt indorsed: (Hughes' Pract. Conv. 196, *et seq.*)

**Q.**—What is a feoffment, and is there anything, and if so, what, essential to perfect it?

**A.**—A feoffment is the gift or grant of honours, castles, manors, messuages, lands, houses, or other corporeal hereditaments, to another in fee simple. It is properly a conveyance in fee, and yet it is improperly called a feoffment where an estate of freehold only passes: (Co. Litt. 9.) To perfect it, it must be accompanied by a formal delivery-up of possession, called livery of seisin: (Co. Litt. 48 a; Will. Real Pro. 117, *et seq.*, 4th edit.; 1 Steph. Com. 467, *et seq.*)

**Q.**—What are the different kinds of livery of seisin?

**A.**—They are of two kinds—a livery in *deed*, and a livery in *law*. A livery in *deed* is where the feoffor takes the ring of the door, or a turf of the land, and delivers the same upon the land to the feoffee in name of seisin of the land. But a livery may be made by words without any act or ceremony at all, as the feoffor being at the house door or within the house says, "I deliver to you seisin and possession of this house, in the name of seisin and possession of all the lands and tenements contained in this deed." Livery in *law* is where the feoffor says to the feoffee, being within view of the house or land, "I give you yonder land to you and your heirs, go enter into the same and take possession thereof accordingly:" (Co. Litt. 48 a; Will. Real Pro. *ubi sup.*; 1 Steph. Com. *ubi sup.*)

**Q.**—Why is a feoffment no longer a necessary form of assurance?

**A.**—Because after the passing of the Statute of Uses the necessity of formal delivery of possession was dispensed with by creating a term of years by way of bargain and sale under the Statute of Uses, which that statute executed or turned into actual possession in the lessee without entry, who thereupon became capable of accepting a release of the freehold and reversion; the two instruments forming, in point of fact, but one assurance, and was called a lease and release. This mode of conveyance continued in use down to the year 1841, when an act was passed for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties. And now, by the 8 & 9 Vict. c. 106, a deed of grant is alone sufficient for the conveyance of all corporeal hereditaments: (see 2 Hughes' Pract. Sales Real Pro. 155, 156, 2nd edit.; Will. Real Pro. 146, *et seq.* 4th edit.; Steph. Com. chap. 17, vol. 1.)

**Q.**—In what case prior to the act 8 & 9 Vict. c. 106 (*An Act to amend the Law of Real Property*) was a feoffment a necessary form of conveyance?

**A.**—If you wished to acquire a tortious fee, a feoffment was the necessary assurance, but since the above act a feoffment has no longer any tortious operation: (2 Hughes' Pract. Conv. 187; Will. Real Pro. 121, 4th edit.; 1 Steph. Com. 491, 3rd edit.)

**Q.**—What conveyances take effect by force of the Statute of Uses, and what by the Common Law ?

**A.**—Those which take effect by force of the Statute of Uses are the following :—Bargain and sale ; Covenant to stand seised ; Appointment in exercise of a power concerning uses. Those which do so by the Common Law are these :—Feoffment ; Grant ; Gift ; Lease ; Exchange ; Partition ; Release ; Confirmation ; Surrender ; Assignment ; Underlease, Defeasance. Besides these modes of conveyance, there are some which operate partly by virtue of the Statute of Uses, and partly by virtue of the Common Law ; such are these :—Feoffment to uses ; Grant to uses ; Statutory release : (see Steph. Com. vol. 1.)

**Q.**—State the common form of assurance before the Statute of Uses ?

**A.**—Before the Statute of Uses a feoffment with livery of seisin was the common form of assurance : (see Will. Real Pro. 122, 128, 4th edit.)

**Q.**—What is now the simple mode of conveyance for passing freehold estates of inheritance upon a sale ?

**A.**—By the 8 & 9 Vict. c. 106, all corporeal tenements and hereditaments were declared, so far as regarded the conveyance of the immediate freehold thereof, to be deemed to lie in *grant* as well as in livery (sect. 2), so that lands of inheritance may now be conveyed by deed of grant only : (see Will. Real Pro. 147, *et seq.* 4th edit.)

**Q.**—How must freehold property be conveyed by a corporation ?

**A.**—By deed under their corporate seal.\* Formerly corporations conveyed by feoffment, or by lease and release, with an actual entry by the lessee previous to the release (2 Hughes' Pract. Sales Real Pro. 155, 2nd edit.) ; but now, under the 8 & 9 Vict. c. 106, a common law grant upon which uses may be engrafted may be used.

**Q.**—Is there any custom which enables an infant to convey, by any and what form of assurance ?

**A.**—By the custom of gavelkind, every tenant of an estate of freehold (except of course an estate tail) is able, at the early age of fifteen years, to dispose of his estate by feoffment : (Will. Real Pro. 106, 4th edit. ; 8 & 9 Vict. c. 106, s. 3.)

**Q.**—A. is to convey an estate to B. for life ; by what conveyance may this be effected ?

**A.**—It may be conveyed by deed of grant : (8 & 9 Vict. c. 106, s. 2.)

**Q.**—In examining an abstract with the title deeds on behalf of a purchaser, what would be the consequence to the solicitor personally, of his overlooking notice of any incumbrance contained in any instrument abstracted and produced for examination, whether such notice were contained in the abstract or otherwise ?

**A.**—If the purchaser sustains any loss or injury in consequence of his solicitor's negligence, the latter will become personally liable to make good the same, and the purchaser will be entitled to maintain an action against him and recover damages accordingly : (see Arch. N. P. 3, 40, 402 ; Sug. V. & P. Conc. View, 405.)

**Q.**—In preparing an abstract of title on a sale, is the vendor's solicitor personally liable for omitting to state all the incumbrances within his knowledge ?



*A.*—If the vendor's solicitor wilfully conceals incumbrances or denies that there are any, he renders himself personally liable to the purchaser : (Hughes' Pract. Conv. 161.)

*Q.*—On an exchange of land, what would be the consequence of ouster of one of the parties from defect of title ?

*A.*—Formerly on an exchange of land there was an implied warranty which engendered the right of entry in case of eviction ; but since the 8 & 9 Vict. c. 106, s. 3, the only remedy in such case is on the covenants : (see 1 Hughes' Pract. Sales Real Pro. 247, 2nd edit. ; Will. Real Pro. 367, 4th edit.)

*Q.*—What is the technical distinction between absolute covenants for title and qualified covenants ?

*A.*—Absolute covenants extend to the acts of the *whole world* ; qualified covenants are restricted to the acts of the *covenantor or of himself and those under whom he claims* by descent, or will : (see Will. Real Pro. 368, 398, 4th edit.)

*Q.*—What are the usual covenants for title entered into by a vendor with a purchaser on the sale of a freehold estate ?

*A.*—Generally speaking, a vendor of real estate can only be required to enter into qualified covenants for title, which run as follows : that he is seised in fee, has good right to convey, for quiet enjoyment, freedom from incumbrances, and for further assurance. The covenants, that the vendor is lawfully seised, and that he has good right to convey, are considered as synonymous ; so much so in fact, that the former is now more frequently omitted than inserted in conveyances : (see 2 Hughes' Pract. Sales, 202 to 204 ; 2nd edit. ; Sug. V. & P. Conc. View, 430, 459 ; Will. Real Pro. 368, 398, 4th edit.)

*Q.*—The like covenants from a vendor to a purchaser, and *vice versâ*, of leasehold estate ?

*A.*—The covenants in this case usually run thus, viz. : that the lease is valid ; that all outgoing, such as rent and taxes, have been paid, and all covenants and conditions performed ; that the vendor has good right to assign for quiet enjoyment, freedom from incumbrances, and for further assurance. The covenants on the part of the purchaser are, to pay rent, and perform the covenants reserved and contained in the lease, and to save the assignor harmless therefrom : (see *supra* ; Prideaux's Conv. 98, &c. 2nd edit.)

*Q.*—Title deeds required to be examined are found not to be in the possession of the vendor, but in the hands of a third person in the country ; what is the course to be pursued for the examination of the deeds, and at whose expense ?

*A.*—The vendor is bound to produce all documents set out in the abstract, although they are not in his possession, nor the purchaser entitled to have them delivered over to him, if the documents are of such a nature as are usually handed over to a purchaser ; records, such as fines and recoveries, are not included in the above rule, for office extracts and copies are all a purchaser can call for : (Hughes' Pract. Conv. 154.) The expense of the production of all deeds not in the vendor's possession, as also of journeys and all other incidental costs necessary for comparing the documents of title with the abstract must, in the absence of stipulation to the contrary, be borne by the vendor : (*Ib.* ; Sug. V. & P.

Conc. View, 317.) But the vendor may produce the deeds for examination, either at his own known residence, or upon or near the estate, or in London (for the examination may then be effected through the London agent); and the *purchaser* in such case bears the expense of the examination, &c.: (Dart's V. & P. 225, 2nd edit.; Sug. V. & P. Conc. View, 318.)

Q.—At what place must the title deeds be produced for examination; and when the vendor and his solicitor reside at a distance from the premises, who must bear the extra expense of examination?

A.—The vendor may (as before seen) produce the deeds for examination either at his own known residence, or upon or near the estate, or in London; and the purchaser in such cases pays for the necessary journeys of his solicitor: (Dart's V. & P. 225, 2nd edit.; Sug. V. & P. Conc. View, 317.) The extra expense of the examination of all deeds not so produced, as also of all journeys and all other incidental expenses, unless otherwise stipulated for in the conditions of sale, must be borne by the vendor: (see Hughes' Pract. Conv. 154; Dart's V. & P. 225, 2nd edit. *et sup.*)

Q.—State the practice in case a vendor is entitled to retain the title deeds, as to what the purchaser may require, and at whose expense?

A.—If the vendor retains the title deeds the practice is, that the purchaser will be entitled to a covenant from him for their production, and also to have attested copies, extracts or abstracts of them. The expense must be borne by the vendor, unless otherwise stipulated for: (see 2 Hughes' Pract. Sales Real Pro. 207, 229, 2nd edit., where a form of covenant is given.)

Q.—Who should covenant for the production of title deeds which cannot be delivered to a purchaser?

A.—The vendor must covenant for their production. If, however, the property be sold in lots, the purchaser of the largest lot has the title deeds, and covenants for the production: (Will. Real Pro. 378, 4th edit.)

Q.—Will a covenant for production of title deeds in any and what case run with the land?

A.—A covenant for production of title deeds is a covenant running with the land in favour of a purchaser: (see Will. Real Pro. 378, 4th edit.; Sug. V. & P. Conc. View, 336.)

Q.—If the purchaser of one lot of an estate give a deed of covenant for production of title deeds to the purchaser of another lot, and afterwards sell and convey the property he bought, and part with the deeds, will the covenant run with the land, and will his personal liability under the deed of covenant be discharged, or how is the discharge of it to be provided for, and the production of the deeds secured to the covenantor?

A.—A covenant for the production of deeds runs with the land if in favour of a purchaser; therefore, where a purchaser of one lot enters into a covenant for production of title deeds to the purchaser of another lot, and afterwards sells the property he bought, and parts with the deeds, he is still liable on his covenant. The proper mode is to insert a clause in the deed providing that if he should sell the property bought, and part with the deeds, he will cause the purchaser to enter into the like covenant for the production before doing so: (see Will. *sup.*; Sug. *sup.*)

**Q.**—What are the duties of the solicitor in comparing an abstract of title with the deeds, &c. ?

**A.**—The duties of the solicitor in comparing the abstract with the deeds are to see that the title is carried back sufficiently far <sup>2</sup> to discover the legal operation of the various instruments, as well as the capacity of the several parties <sup>3</sup> that there is a clear deduction both of the legal and equitable estate <sup>4</sup> that all particular estates are either determined or are capable of being conveyed to the purchaser or otherwise disposed of <sup>5</sup> to ascertain if there are any charges or incumbrances affecting the property, and if so, whether they are of such a nature that the vendor is unable to discharge them, or of such a kind that he can get in, and thus pass an unincumbered estate to the purchaser <sup>6</sup> it must also be seen that the parcels comprised in each instrument are the same as those comprised in the former documents <sup>7</sup> it should also be ascertained that the deeds are properly stamped, &c. : (see 1 Hughes' Pract. Conv. 127, 128, *et seq.*)

**Q.**—If the abstract show a good title on the face of it, but the purchaser's solicitor on comparing it with the title deeds discovers an incurable defect, is the purchaser entitled to recover from the vendor the expense of comparing the abstract with the deeds ; and would he be so if the defect appeared on the face of the abstract ?

**A.**—If the abstract shows a good title on the face of it, but the purchaser's solicitor on comparing it with the title deeds, discovers an incurable defect, the purchaser will be entitled to recover from the vendor the expense of comparing the abstract with the deeds. If the abstract be defective on the face of it, the purchaser's solicitor will be entitled to the costs of perusal, &c. ; unless in either case the contract is by parol : (see Sug. V. & P. Conc. View, 262 ; Hughes' Pract. Conv. 172, 173.)

**Q.**—Upon a sale of part of an estate without any stipulation as to deeds, who is entitled to the custody of them ; and if the purchaser, is he bound to furnish the seller (who retains the other part of the estate) with attested copies, and at whose expense ?

**A.**—On the sale of part of an estate the vendor generally retains the deeds and gives the purchaser attested or other copies, &c. of them at his own expense, unless it be stipulated to the contrary ; he also enters into a covenant for production of the original deeds when required. If the estate be sold in lots, then the purchaser of the largest lot takes the deeds and covenants for production ; and the vendor furnishes the other purchasers with attested or other copies, extracts or abstracts of them, at his own expense, unless there be a stipulation to the contrary : (Hughes' Pract. Conv. 45, 233 ; Will. Real Pro. 378 ; Sug. V. & P. Conc. View, 326, *et seq.*)

**Q.**—Where a purchaser has not obtained the title deeds, or a covenant for the production of them, can he require such a covenant to be executed to him under the usual covenant for further assurance ?

**A.**—If a purchaser has not obtained the title deeds, or a covenant for the production of them, it is a doubtful question whether a covenant for *further assurance* will entitle a purchaser to call for a covenant for the production of title deeds. In *Fain v. Ayres* (2 Sim. & St. 533) the question arose, but was not decided ; still the prevailing opinion of the profession seems to be that a purchaser has no such right, the covenant for further assurance being restricted to mean the assurance by way of conveyance, and not to comprehend further obligations to be imposed on

a vendor by way of covenant : (Hughes' Pract. Conv. 233 ; Sug. V. & P. Conc. View, 326.)

**Q.**—If a person contract for the sale of his estate, and afterwards become a lunatic, who can convey the estate to the purchaser ; and what course should be pursued on such an occasion ?

**A.**—Application should be made to the Lord Chancellor for a vesting order, which has the same effect as if the party had been sane, and had duly executed a conveyance of the lands in the same manner and for the same estate. A person may be appointed to convey if thought necessary : (13 & 14 Vict. c. 60 ; Sug. V. & P. Conc. View, 144, 145, 148.)

**Q.**—If a man seised in fee of land contract with another for the sale of it, and both parties die before the sale is completed, does the contract continue in force ; and what is the consequence as regards the title to the land, and as regards the title to the purchase money ?

**A.**—The death of the vendor or vendee before the conveyance or surrender, or even before the time agreed upon for completing the contract, is in equity immaterial. If the vendor die before payment of the purchase money, it will go to his executors and form part of his assets : (Sug. V. & P. Conc. View, 122.) If the purchaser should die, his heir-at-law or devisee may come into a court of equity and insist on a specific performance of the contract ; and, unless some other circumstance affect the case, he may require the purchase money to be paid out of the personal estate of the purchaser, in the hands of his personal representative : (*Id.* 126 to 133 ; Story's Eq. Jur. § 790.)

**Q.**—Is the devisee of an estate contracted to be sold, but not conveyed, to the testator, entitled to have a conveyance to him from the vendor ; and by whom, and from what fund, is the purchase money to be paid ?

**A.**—The devisee will be entitled to have a conveyance of the estate to him, and the purchase money paid out of the personal estate of the testator : (Story's Eq. Jur. § 788, *et seq.* ; Sug. V. & P. Conc. View, 125.)

**Q.**—Would a contract for the purchase of land be impeachable or not by a vendor, on the ground of considerable inadequacy of consideration, but not of fraud ?

**A.**—Mere inadequacy of consideration, or any other inequality in the bargain, does not constitute by itself a ground for avoiding the contract, except in the case of the expectant heirs or remaindermen : (Story's Eq. Jur. §§ 244, 246 ; Smith's Man. Eq. 3rd edit.)

**Q.**—Is a purchaser bound to take a conveyance executed by the attorney for the vendor, under a power of attorney, with any and what form of condition ?

**A.**—A purchaser is not bound to take a conveyance executed under a power of attorney unless an actual necessity appears for it, because the vendor may be dead at the time the power is exercised, and in that case the execution would be void, as a power of this nature expires by the death of the principal. If a purchaser does take a conveyance so executed, the attorney should also execute a declaration of trust, that he will stand possessed of the purchase money in trust for the purchaser, until it either appear by satisfactory evidence that the vendor was alive at the time of the execution of the deed, or, if he shall be dead, until the estate is duly conveyed to the purchaser : (Sug. V. & P. Conc. View, 420, 421.)

Q.—What searches should be made before completing a purchase ; and what would be the consequence of not making such search ?

A.—Search should be made in the Common Pleas Registry Office for judgments, annuities and *lis pendens* for a period of five years next preceding the completion ; also for Crown debts and accountantship to the Crown, which search may (22 & 23 Vict. c. 35, s. 13) be confined to the last preceding five years. Search is also sometimes made for bankruptcy and insolvency. And where the property lies in a district subject to the Registry Acts, viz., Middlesex, Yorkshire, Kingston-upon-Hull, and the Bedford Level, searches should be made in the local registers. If the attorney neglect to make the proper searches, and the purchaser sustain any loss, the attorney will become personally liable to make good the same : (Will. Real Pro. 71, &c. 4th edit. ; Hughes' Prac. Conv. 160 to 168 ; Sug. V. & P. Conc. View, 394, *et seq.*)

Q.—What should be done to postpone searches for incumbrances until immediately before the completion of the purchase ?

A.—The search may be delayed by asking the vendor's solicitor if there are any incumbrances, and if he replies that there are not, search may be postponed until immediately before the execution of the conveyance : (1 Hughes' Prac. Conv. 161, 162 ; Sug. V. & P. 6, 7, 405.)

Q.—What search should be made for judgments affecting real estate ; and how far back should such search be made ?

A.—Search should be made in the Common Pleas Registry Office for judgments ; this search need only be made for the last preceding five years : (see references, *supra.*)

Q.—Are copyhold and leasehold estates, or either of them, in the hands of a purchaser, affected by judgments against the vendor, entered in the Common Pleas Office at the date of the sale ; and under what authority ?

A.—Both copyhold and leasehold estates in the hands of a purchaser ~~are~~ <sup>used</sup> bound by judgments against the vendor, if duly registered, by the statute 1 & 2 Vict. c. 110 ; but if the purchaser is without notice of the judgment, he will not be bound further than he would under the old law : (sect. 13, and 2 & 3 Vict. c. 11, *et ante*, pp. 165, 166.) *but by 23 & 24 of 2 Geo. 4 c. 16 s. 1 it is so affected and it is not a condition of being registered before con*

Q.—If the grantee of an annuity employ the grantor's attorney to <sup>to</sup> prepare the deeds, is such attorney bound to disclose any circumstance that may affect the security ?

A.—It seems not ; if the grantee employ the grantor's attorney to prepare the deeds, the mere preparation of the deeds does not place him in a confidential relation towards the grantee : (Sug. V. & P. Conc. View, 6.)

Q.—Ought a purchaser of an estate to ascertain the terms of the tenancy of the occupier of the estate, and why ?

A.—The purchaser of an estate should, whenever the property is in the occupation of a tenant, inquire into the nature of his tenancy ; for if a purchaser should neglect to do this, he will be considered to have implied notice of that title ; notice of a tenancy being considered as implied notice of the terms upon which the premises are holden : (1 Hughes' Pract. Conv. 157.)

Q.—If a contract of sale describe property as leasehold, can the purchaser successfully resist a bill for specific performance on the ground

that after the contract he discovered that the lease contained an unusual covenant?

A.—The purchaser cannot resist a specific performance on the ground that after the contract he discovered that the lease contained an unusual covenant; for notice of a lease is notice of the contents: (see Story's Eq. Jur. § 400; Sug. V. & P. Conc. View, 611; Hughes' Pract. Conv. 517.)

Q.—State shortly the duties of a solicitor in conducting the purchase of real estate.

A.—The purchaser's solicitor should look carefully into the conditions (supposing the sale to be by auction) to see that they do not press too heavily on a purchaser; it will also be his duty to see that there is a good title to the property by examining title deeds, with abstract, &c., and make the necessary searches for incumbrances; he will also have to prepare the purchase deed and tender it for execution. He should not only secure to his client such a title as will protect him from eviction, but such a title as a subsequent purchaser or mortgagee may be compelled to accept: (1 Hughes' Pract. Sales Real Pro. ch. 4; 2 *id.* ch. 10, 2nd edit., and see fully *ante*, p. 179.)

Q.—In the absence of conditions of sale to the contrary, how is the purchaser to obtain attested copies of abstracted title deeds of instruments on record at the vendor's expense?

A.—It would seem that the purchaser is not entitled to attested copies of instruments on record unless they are in the vendor's possession. The rule seems to extend to instruments not strictly of record, as deeds enrolled for safe custody in a court of record, or wills registered and accessible. But if the vendor has not the instrument itself, and cannot obtain it, and can make a title without producing the deed itself, he is bound to procure an office or attested copy of it to enable the purchaser to ascertain that the abstract is correct. And when it is obtained, the purchaser is of course entitled to it on the completion of the purchase; unless, indeed, the vendor retains other estates holden under the same title: (Sug. V. & P. Conc. View, 331, 332; 2 Hughes' Pract. Sales, 230, 2nd edit.)

Q.—What is a deed of partition, and by whom made?

A.—A deed of partition is a private arrangement whereby joint tenants, tenants in common and coparceners, agree to a division of lands or tenements: (Will. Real. Pro. 81, 114, 367, 4th edit.)

Q.—Designate the several parts of a conveyance from A. seised in fee, to B. in fee. Is there any, and what, formal difference, supposing A. to have taken the estate by descent from his father or other ancestor?

A.—They will be the following: parties, recitals, testatum (where, in consideration of purchase money, A. grants, &c. to B. and his heirs the premises), and the habendum; then follow the covenants, viz.: that A. is lawfully seised, has good right to convey, for quiet enjoyment, freedom from incumbrance, and for further assurance. The covenants, that the vendor is lawfully seised and has good right to convey, are considered as synonymous, and the first is generally left out in practice. If A. took the estate by descent, he must covenant for the acts of his ancestors, as well as for himself and those claiming under him: (2 Hughes' Pract. Sales, 202, 204; and for a form, see *id.* Appendix; Will. Real Pro. 368, 398, 4th edit.)

**Q.**—Is it necessary to the validity of a deed that it should in any and what cases be read over to the parties ?

**A.**—It is necessary that a deed should be read whenever any of the parties desire it ; and if this be not done it is void as to him : (1 Steph. Com. 473, 3rd edit.)

**Q.**—If a purchase deed be executed under a power of attorney from the vendor, in whose name should it be executed, and what is necessary for the purchaser to consider ?

**A.**—The deed should be executed in the name of the vendor, adding the words “by A. B., his attorney.” The purchaser should satisfy himself that the vendor is living at the time of the execution by the attorney, as a power of this kind expires at the death of the principal : (Sug. V. & P. Conc. View, 420, *et ante*, p. 180.)

**Q.**—What are the essentials to be attended to on the execution of deeds, as well under a power as otherwise ?

**A.**—Where a deed was executed under a power, the terms of the power must have been strictly followed : (see 1 Steph. Com. ch. 16 ; Will. Real Pro. 247 to 249, 4th edit. ; 1 Hughes’ Pract. Sales, 221, 2nd edit.) The 22 & 23 Vict. c. 35, however, now enacts that a deed hereafter executed in the presence of, and attested by, two or more witnesses, in the manner in which deeds are ordinarily executed and attested shall, so far as regards the execution and attestation thereof, be a valid execution of the power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity. But if the consent of any person is necessary to the execution, it must still be obtained ; or if any act is to be performed, not having reference to the mere execution, it must still be done. It is also provided that the terms of the power may, if thought fit, be followed (a) : (sect. 12.) It is absolutely necessary to the due execution of a deed that it be *sealed and delivered* ; the act of sealing must precede the delivery, and although signing is the usual practice, it is not always essential to the execution of a deed, and one witness is sufficient : (see 1 Steph. Com. ch. 16 ; Will. Real Pro. 247 to 249, 4th edit.)

**Q.**—By what means are the respective species of property usually conveyed and transferred ?

**A.**—Freeholds are generally conveyed by grant and release. Copyholds pass by surrender, which is completed by admittance. Leaseholds are transferred by assignment. Personal chattels pass by mere delivery.

**Q.**—What are extraordinary conveyances, and those by matter of record ?

**A.**—They are, firstly, private acts of Parliament ; and, secondly, royal grants : (1 Steph. Com. 592, 3rd edit.)

**Q.**—By a marriage settlement a sum of money is to be raised for younger children of the marriage ; state the usual mode by which that is to be effected.

**A.**—By means of a long term of years vested in trustees : (see Will. Real Pro. 340, 4th edit.)

(a) It will be seen that this section is similar to that contained in 1 Vict. c. 26, as to the execution of wills under power.

**Q.**—Will an appointment attested by two witnesses be good in any and what case, when the power requires more witnesses than two ?

**A.**—If the appointment is by deed, the terms prescribed by the power need not now be strictly followed (see *ante*, p. 183.) If the appointment is to be by will, it must be executed as required by the statute 1 Vict. c. 26 : (see Will. Real Pro. 249, 4th edit.)

**Q.**—What is necessary to effect an exchange of lands under the General Inclosure Act ?

**A.**—By the 8 & 9 Vict. c. 118, it is provided that all exchanges under which land shall be taken and allotted for public purposes as aforesaid (see preceding part of the section) shall be made with the consent of the person interested in the land so taken, and that all other exchanges be made with the consent in writing of the person interested in the lands so exchanged ; and every such exchange so to be made shall be valid and effectual to all purposes, and shall be specified and declared in the award. No exchange, however, is to be made of any land held in right of any church or chapel, or other ecclesiastical benefice, without the consent in writing of the bishop of the diocese and the patron of such benefice : (sect 92.) By sect. 147 it is declared, that exchanges may be made of land, although not subject to be inclosed under this act. This act is further amended by the 9 & 10 Vict. c. 70 ; 11 & 12 Vict. c. 99 ; 12 & 13 Vict. c. 83 ; 20 & 21 Vict. c. 31.

**Q.**—An allotment of land is awarded to A. in the inclosure of common field lands in lieu of A.'s previously existing rights. Is the purchaser of the allotment from A. entitled to any other evidence of A.'s title than the award of the commissioners and proof of their authority to make it ?

**A.**—If an allotment of land is awarded to A. in the inclosure of common field lands, in lieu of A.'s previously existing rights, on a purchase of the allotment from A., the title down to the exchange must be that of the estate given in exchange. / Where, however, the estate has been taken in exchange under the general provisions of the Inclosure Act, 8 & 9 Vict. c. 118, the single title alone seems necessary ; as the act contains a clause making the award, when confirmed, conclusive evidence that the directions of the act have been complied with, and declaring that every allotment, exchange, &c. specified and set forth in the awards, shall be binding and conclusive on all persons whomsoever : (Dart's V. & P. 180, 2nd edit. ; Sug. V. & P. Conc. View, 271, 273 ; Hughes' Pract. Conv. 109, 110.)

**Q.**—B. purchases from A. fifteen acres of land in a hamlet ; A.'s title deeds disclosing a clear sixty years' title to fifteen acres of land in that hamlet. Ought anything more to be done by B. before he can safely take a conveyance from A. and pay the purchase money ?

**A.**—On a purchase by B. of fifteen acres of land from A., and A.'s title deeds disclose a sixty years' title, B. may, if he has identified the parcels and searched for judgments, annuities, Crown debts and *lis pendens* in the Registry Office of the Common Pleas, and also for incumbrances in the local registry, if the lands lie in a registry county, viz., Middlesex, Yorkshire, or Kingston-upon-Hull, and finds none, except what may be disclosed on the abstract of title, if any, take a conveyance of such lands and pay the purchase money.

**Q.**—A. possessed of leaseholds for years, appoints B. and C. his executors ; B. proves the will of A. afterwards B.'s executor afterwards



sells the leaseholds to D. Is any evidence of the title subsequent to A.'s death necessary beyond the probates of the wills of A. and B. ?

A.—If A., possessed of leaseholds for years, appoints B. and C. his executors, and if B. proves the will and C. renounces, and B.'s executor afterwards sells the leaseholds to D., D. has a right to call for the production of the lessor's title, unless there is a stipulation to the contrary. So the fact of C.'s renunciation should be stated in the abstract ; and if the lands lie in a registry county, and the will has been registered, this should be stated, as well as the setting-out of the probates of the wills : (see Hughes' Pract. Conv. 15, 120, 121.)

Q.—Is any and what formality necessary to the completion of a feoffment and bargain and sale respectively, after they have been signed by the feoffor and bargainor.

A.—To a feoffment, livery of seisin is necessary to its completion (Co. Litt. 48 a); to a bargain and sale, enrolment is necessary to its completion and validity: (27 Hen. 8, c. 16; Will. Real Pro. 150, 4th edit.)

Q.—Is a sixty years' title sufficient in all cases, or does it ever, and when, become necessary to go further back ?

A.—A sixty years' title is not sufficient in all cases, ~~for~~ In deducing a title to an advowson one hundred years is required, as the presentations, which are the only fruits of the advowson, and, consequently, the only occasions when the title is likely to be contested, occur only at long intervals: (Will. Real Pro. 374, 4th edit., and see ante p. 139.) *In every statement in the abstract or its silence leads to open up*

Q.—Where it is proposed to convey an estate by lease and release, can the lease be dispensed with, and under what authority ?

A.—The 4 & 5 Vict. c. 21, was passed for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties ; since which the lease for a year has been dispensed with. The conveyance of real estate was further facilitated by the 8 & 9 Vict. c. 106: (see Will. Real Pro. 146, 4th edit., et ante, p. 176.)

Q.—What was the advantage of taking a conveyance of a reversion by lease and release, instead of by grant ?

A.—Because it saved the expense, in future investigations of the title, of proving the existence of a particular estate at the time the reversion was conveyed as such: (Watk. Conv. 193 n, Cov. edit.)

Q.—What are the several parts of a deed of conveyance by grant and release ? State the form to prevent dower.

A.—The several parts of a conveyance by grant and release to prevent dower are these: parties; recitals; testatum, by which vendor, in consideration of purchase money, grants and releases the premises; habendum to dower uses: (see ante, p. 147); declaration to bar purchaser's widow of dower; covenants from vendor that he has good right to convey for quiet enjoyment; freedom from incumbrances, and for further assurance: (see 2 Hughes' Pract. Sales Real Pro. Appendix, No. 3, where a form is given.)

Q.—What is an escrow ?

A.—When a deed is not delivered absolutely but conditionally—that is, not to the grantee himself, or to some person for him, but to a third person to keep it until something is done by the grantee—it is said to be delivered not as a deed but as an *escrow*, i.e., as a *scrowl*, or writing, which is not to take effect until the condition is performed, when it

becomes a good deed : (Holth. Law Dic. 2nd edit; Will. Real Pro. 141, 4th edit.; 1 Steph. Com. 459.)

Q.—What is a defeasance ?

A.—A defeasance is a collateral deed made at the same time with some other principal deed or instrument, and containing certain conditions, on the performance of which the intentions of the principal deed may be defeated or rendered null and void : (1 Steph. Com. 506, 3rd edit.) *It differs from a condition in this respect, that a condition is subject to the death, by wch the est. is created - the defeasance is a deed in itself.*

Q.—Does the word “grant” in a conveyance imply in all cases, or in any and what cases, a warranty of title ?

A.—By the 8 & 9 Vict. c. 106, s. 4, the word *give* or the word *grant* in a deed shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the word *give* or the word *grant* may by force of any act of Parliament imply a covenant. By the Registry Acts for Yorkshire, statute 6 Anne, c. 35, ss. 30, 34; 8 Geo. 2, c. 6, s. 35, the words *grant, bargain and sell*, in a deed of *bargain and sale* of an estate in fee simple, enrolled in the register office, imply covenants for quiet enjoyment of the lands against the bargainor, his heirs and assigns, and all claiming under him, and also for further assurance thereof by the bargainor, his heirs and assigns, and all claiming under him, unless restrained by express words. The word *grant* also implies covenants for title in conveyances by companies under the Lands Clauses Consolidation Act 1845, statute 8 & 9 Vict. c. 18, s. 132 : and in conveyances to the Governors of Queen Anne’s Bounty, statute 1 & 2 Vict. c. 20, s. 22 : (Will. Real Pro. 367, 368, 4th edit.)

Q.—Who are the proper parties to assign a lease of a deceased testator, who bequeathed it specifically; and why ?

A.—Chattels real go in the first instance to the executor for the payment of the testator’s debts ; in order to do which the executor has absolute power to assign and dispose of them, and his receipt is a sufficient discharge to a purchaser, notwithstanding the leaseholds may be specifically bequeathed. But when bequeathed to any person by the will, they pass to him without any assignment, by the mere signification of the executor’s assent : (see Burton’s Comp. pl. 931, 932; Prideaux’s Conv. 603, 2nd edit.) This consent may be given by the executor and the legatee joining in the assignment to a purchaser.

Q.—State the date and some of the provisions of the act for the prevention of frauds and perjuries, usually entitled the Statute of Frauds.

A.—The Statute of Frauds (29 Car. 2, c. 3), provides that no action shall be brought to charge any executor or administrator upon any special promise to answer damages out of his own estate; or to charge a defendant upon any special promise to answer the debt, default, or miscarriage of another person ; or to charge any person upon any agreement made upon consideration of marriage ; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them ; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised: (sect. 4.) And by sect. 17, it is further provided that no contract for the sale of any goods, wares, or merchandise for the price of 10*l.* sterling or upwards, shall be

allowed to be good except the buyer shall accept part of the goods so sold; and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged therewith, or their agents thereunto lawfully authorised: see also *infra*. - 9. 11. 13

Q.—What parol agreements giving an interest in land are valid within the Statute of Frauds? And state generally what acts constitute such part performance as would induce a court of equity to enforce an agreement notwithstanding the statute.

A.—A lease not exceeding three years, with a rent of not less than two-thirds of the improved value, is exempted by the 2nd from the 4th section of the Statute of Frauds, which requires contracts, &c. concerning lands and tenements to be in writing signed by the party to be charged therewith, or his authorised agent: (sec 1 Steph. Com. 476.) As to what acts constitute a part performance of a verbal agreement which will induce a court of equity to decree a specific performance of such agreement, they should be such as are clearly and exclusively referable to a complete agreement, and must have been done with no other view than to perform such agreement; and they must have put the party who has performed them in such a situation that it would be a fraud in the other party, after allowing him to do them, not fully to perform the agreement. For the grounds on which courts of equity enforce specific performance in such cases is, that if the party allowing these acts to be done were not obliged to fulfil the agreement, it would be permitting him to commit a fraud, the very crime which the statute was designed to prevent: (Story's Eq. Jur. § 764, &c.; Smith's Man. Eq. Jur., 204, 5th edit.)

Q.—Define what is meant by the legal term “covenant.”

A.—A covenant is a kind of promise contained in a deed to do a direct act, or to omit one; and is a species of express contract, the breach of which is a civil injury. The person who makes such a covenant is termed the *covenantor*, and he with whom it is made, the *covenantee*: (Holth. Law Dic. 2nd edit.; 1 Steph. Com. 455.)

Q.—Must an agreement be sealed, or may it only be signed agreeably to the Statute of Frauds?

A.—An agreement need not be sealed; the Statute of Frauds (29 Car. 2, c. 3) only requires them to be signed: (see 1 Hughes' Pract. Sales Real Pro. 75, 87, 2nd edit.)

Q.—What do you understand by the word “hereditament,” and what will pass by it in a deed?

A.—The word hereditament includes all things which may be inherited. This word is one of the most comprehensive that is used in deeds, for it includes not only lands and tenements, but also whatever may be inherited, be it corporeal or incorporeal, real, personal, or mixed. By the grant, therefore, of all hereditaments, may pass honours, isles, castles, seigniories, manors, messuages, lands, meadows, pastures, woods, moors, furzes, heaths, reversions, commons, rents, annuities, vicarages, advowsons in gross, tithes, offices, and the like, which the grantor hath in fee simple, at the time of the grant, whether he hath them by purchase or descent: (Holth. Law Dic. 2nd edit.; Co. Litt. 6; 1 Steph. Com. 164, 3rd edit.; Will. Real Pro. 5, 12, 4th edit.)

**Q.**—To vest an estate in fee simple, what are the requisite words in the habendum of the conveyance?

**A.**—In every conveyance (except by will) of a fee simple, the word *heirs* is necessary to be used as a word of limitation to mark out the estate: (Will. Real Pro. 120, 4th edit.) The words of the habendum usually run thus: “to have and to hold the said and all and singular other the premises hereinbefore described and hereby granted and released, with the appurtenances, unto and to the use of the said A. B. his heirs and assigns for ever:” (see 2 Hughes’ Pract. Sales Real Pro. Appendix.)

**Q.**—What is a power of attorney, and how is it put an end to?

**A.**—A power or letter of attorney is a writing authorising an attorney to do any lawful act in the stead of another, as to recover debts, or sue a third person, &c., which may be either general or special. In every case the authority must be strictly pursued, and must be executed during the life of the person who gives it: (Co. Litt. 52; Holth. Law Dic. 2nd edit.) It may be revoked by instruments of the same nature; that is to say, by deeds under seal by the persons giving the power. It is also revoked by death. A power of attorney given for a valuable consideration cannot, however, be revoked: (Sug. V. & P. Conc. View, 420; and see hereon, 22 & 23 Vict. c. 35, s. 36.)

**Q.**—What is necessary for the due execution of a warrant of attorney?

**A.**—A warrant of attorney to confess judgment in a personal action must be executed in the presence of an attorney of one of the superior courts on behalf of the person executing it, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant of attorney; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney: (1 & 2 Vict. c. 110, s. 9.)

**Q.**—In what session of the present reign was the Succession Duty Act passed? How does this affect the title to be shown to real estate?

**A.**—The Succession Duty Act was passed in the 16th and 17th session of the present reign. The mode in which it affects the title to be shown to real property is this: where succession duty is imposed by the act (see sect. 2), it becomes a first *charge* on the *interest* of the successor, and of all persons claiming in his right, in all the real property in respect whereof such duty shall be assessed, and is a debt due to the Crown from the successor, having priority over all charges and interests created by him: (see sects. 42, 44.) Therefore, where real property is bought subject to succession duty, the receipt for such duty must be called for, which receipt exonerates a *bonâ fide* purchaser for value, without notice, from such duty: (see further sect. 52 of the act 16 & 17 Vict. c. 51, Thring’s edit.)

**Q.**—If a person, who is tenant for life of property under a will, dies before all the instalments of succession duty are paid, what is the effect with regard to the unpaid instalments, and what the effect where the person who is entitled to the fee simple dies before all the instalments are paid?

**A.**—If a person, who is tenant for life of property under a will, dies before all the instalments of succession duty are paid, the instalments not

due at the death of such tenant for life cease to be payable. But in the case of a tenant in fee, he being capable of devising his interest by will, the instalments unpaid at his death will be a continuing charge on the estate, in exoneration of his other property, and will have to be paid by the owner for the time being of such estate. The duty is payable by eight half-yearly instalments; the first instalment being paid on the expiration of a year after the successor became beneficially entitled to the estate: (see sect. 21 of 16 & 17 Vict. c. 51.)

**Q.**—A. agrees to sell a leasehold estate to B. without any special conditions as to title; what title can B. require?

**A.**—B. has a right to a full sixty years' title as if he were the purchaser of the fee simple itself: (see Will. Real Pro. 370, 4th edit.; Sug. V. & P. Conc. View, 265, 267.)

**Q.**—What do you understand by the doctrine of estoppel?

**A.**—A man is sometimes precluded in law from alleging or denying a fact in consequence of his own previous act, allegation, or denial to the contrary; and this preclusion is called an *estoppel*. It may arise either from matter of *record* or from matter in *pais*, i. e., matter of fact: (Holth. Law Dic.)

**Q.**—Can estoppel arise under a deed-poll?

**A.**—Yes; estoppel can arise under a deed-poll: (Co. Lit. 352 b.) But a deed-poll is but of one part, and will be expounded to be the sole deed of the party making it, and the words therein contained will be construed to be binding on him only, and, therefore, cannot create an estoppel in point of estate: (1 Hughes' Pract. Sales 168, 2nd edit.)

**Q.**—In cases of doubt as to the proper stamp to be put on a deed, what course would you recommend to be adopted for your client's security?

**A.**—The late Stamp Act (13 & 14 Vict. c. 97, s. 14) contains a useful provision to remedy the difficulty sometimes arising in doubtful cases as to the quantity of the stamp. Upon taking the deed or instrument to the Commissioners of Inland Revenue, and paying a fee of 10s., they will assess and charge the stamp duty which in their judgment is chargeable, and, upon payment of the amount so charged, the commissioners are to impress upon such instrument a denoting stamp. And every deed or instrument so stamped is to be receivable in evidence, notwithstanding any objection as to the insufficiency of the stamp; to this there are some exceptions: (see 2 Hughes' Pract. Sales Real Pro. 296, *et seq.* 2nd edit.; Sug. V. & P. Conc. View, 424.)

**Q.**—Your client has purchased a freehold estate with the timber upon it, and the furniture and fixtures of the mansion; and, on the completion of the purchase, interest on the purchase money is payable by him. Does the *ad valorem* duty on conveyances attach to the whole of the purchase money and interest, or to what part of it?

**A.**—The amount payable for the standing timber and fixtures, being parts of the inheritance, must be included in the consideration, and the *ad valorem* duty paid thereon. And if for any reason the furniture be assigned by deed, the *ad valorem* duty attaches, and its price must be stated; the furniture, however, may pass by mere delivery, and receipts may be given for it, and its price. *Ad valorem* duty will not be payable on the interest: (see Dart's V. & P. 282, 283, 2nd edit.; Sug. V. & P.

Conc. View, 424, *et seq.*; 2 Hughes' Pract. Sales Real Pro. 288, *et seq.* 2nd edit.)

*Q.*—What instruments can be stamped after they are executed, and upon what terms?

*A.*—Agreements may be stamped within fourteen days of their date; after that time on payment of a penalty of 10*l.* Deeds under ordinary circumstances may be stamped on mere application within two months free of penalty; after that time and within twelve months limited special application must be made to the Commissioners of Stamps, by memorial, for remission of penalty; for the commissioners are empowered within twelve months from the first signing of the instrument, when it is shown to their satisfaction that the omission of the proper stamp occurred by accident, mistake, or urgent necessity, and without any intention to defraud the revenue, or to delay or evade the payment of the duty, to remit all or any part of the penalty. After the twelve months there must be paid (in addition to the duty or insufficient duty) a penalty of 10*l.*; and where the duty to be affixed exceeds 10*l.*, then, as a further penalty, interest on such duty at five per cent. per annum, from the date or first execution of the deed; but this interest is limited not to exceed the amount of duty required. Deeds or other instruments executed abroad may be stamped within two months after they are received in this kingdom, on the facts being established to the satisfaction of the Commissioners of Stamps: (see further 13 & 14 Vict. c. 97; Sug. V. & P. Conc. View, c. 13, s. 2.)

## ENROLMENT AND REGISTRATION OF DEEDS, &c.

*Question.*—Mention the provisions of the statutes now in force in England with reference to the registration of deeds and wills, and the places to which they extend; showing, also, what memorial of a deed is required.

*Answer.*—By the Registry Acts (2 & 3 Anne, c. 4, s. 1; 5 Anne, c. 18; 6 Anne, c. 35; 7 Anne, c. 20; and 8 Geo. 2, c. 6,) it is provided that all deeds and wills concerning lands, &c. in Middlesex, or in the East, West and North Ridings of Yorkshire, or in the town and county of Kingston-upon-Hull, shall be registered in offices established for that purpose, and that every such deed or will shall be adjudged fraudulent and void against any subsequent purchasers or mortgagees for valuable consideration, unless, as to deeds, a memorial of them be registered before the registry of the memorial of the deed or conveyance under which a subsequent purchaser or mortgagee shall claim; and unless, as to wills, a memorial of them be registered within six months after the death of the testator, dying within Great Britain, or within three years after his or her death, dying on the sea or in parts beyond the seas. In the case of a deed the memorial must contain the date of and parties to the deed and the parcels, also who executed the deed, and who were the attesting witnesses with their descriptions, and be under the hand and seal of one of the grantors or grantees, attested by two witnesses, one of whom must have been the attesting witness to the execution of the instrument

registered; (see *Prideaux's Conv.* 673, &c., 2nd edit.; *Sug. V. & P. Conc. View*, p. 577, *et seq.*)

**Q.**—What lands or instruments are exempted from the above-mentioned Registry Acts?

**A.**—Copyhold estates, leases at rack rent, and leases not exceeding twenty-one years, where the actual possession and occupation go along with the lease; as also chambers in Serjeant's Inn, the Inns of Court and Chancery, are exempted: (see *Sug. V. & P. Conc. View*, 581; *Prideaux's Conv.* 674, 2nd edit.)

**Q.**—In a register county, is it necessary that the memorial of a deed should be executed by the granting party, and attested by one of the witnesses to the execution of the deed by a granting party, or can the deed be duly registered without either, and which, of these formalities?

**A.**—It is not absolutely necessary that the memorial should be executed by a granting party; it may be under the hand and seal of one of the grantees; but it is necessary that one of the witnesses who attested the execution of the deed must also attest the memorial: (*Sug. V. & P. Conc. View*, 579; *Prideaux's Conv.* 675, 2nd edit.)

**Q.**—Is it necessary that a deed of appointment under a power of a valuable leasehold interest should be registered or not?

**A.**—It is necessary that it should be registered, unless it comes within the exceptions above stated: (*Sug. V. & P. Conc. View*, 577.)

**Q.**—Will a person buying an estate in a register county, with notice of a prior incumbrance not registered, be bound by such incumbrance?

**A.**—Yes, he will be bound by it; for if he has notice he has got all the act intended to supply: (*Story's Eq. Jur.* § 397.)

**Q.**—If deeds relate to estates in a register county, when should such deeds be registered, and what would be the consequence from delay in doing so?

**A.**—As no time is limited by the Registry Acts for registering deeds, they should be registered immediately after execution where the deeds relate to estates in a register county; because, if a subsequent purchaser or mortgagee for valuable consideration was to register first and without notice of the prior conveyance, the subsequent purchaser or mortgagee would prevail over the first vendee or mortgage: (see *Burton's Comp.* pl. 628; 2 *Hughes' Pract. Sales Real. Pro.* 102, 117, 2nd edit.)

**Q.**—What leases of property in Middlesex do not require to be registered?

**A.**—Leases at rack rent, and leases not exceeding twenty-one years, where the possession goes along with them: (see *Sug. V. & P. Conc. View*, 579; *Prideaux's Conv.* 674, 2nd edit.)

**Q.**—Is the non-registry of a lease cured by registering an assignment in which the lease is recited, or not?

**A.**—The registering of the assignment in which the lease is recited does not cure the non-registry of the lease: (*Sug. V. & P. Conc. View*, 578; *Prid. Conv.* 674, 2nd edit.)

**Q.**—In a register county, where the vendor of real estate is both heir-at-law and devisee, is it material that the will should be registered; and is it material if he should be devisee only?

**A.**—In a register county where the vendor is both heir-at-law and devisee, registration of the will is immaterial; for if he sell to any

subsequent purchaser, it must be either in the character of heir-at-law or in the character of devisee. If he sell in this character, the second purchaser must have notice of the will; if he contract in that, the first purchaser has already procured the legal estate: (see 1 Sug. V. & P. 550, 9th edit.) But if the vendor be devisee only, the will should be registered: (Sug. V. & P. Conc. View, 404.)

Q.—If a vendor claim leasehold estate in a register county as executor or legatee, can a purchaser from him insist upon the will being registered in either case? And state a reason.

A.—It seems clear that if the vendor of leasehold estate is either as executor or legatee, the purchaser need not insist upon the will being registered, because no subsequent purchaser can procure a title without notice of the will: (see 1 Sug. V. & P. *sup.*; see also Sug. V. & P. Conc. View, *sup.*)

Q.—If an estate lie in a register county, is a purchaser in any and what cases entitled that a will should be registered?

A.—If an estate lies in a register county, a purchaser from a devisee should not complete his contract till the will is duly registered, unless the vendor be both heir-at-law and devisee, or the estate is leasehold and the seller is either as executor or legatee: (see Sug. V. & P. *supra.*)

Q.—What kinds or descriptions of deeds require enrolment to give them validity; and within what period from their date and execution must they be enrolled?

A.—A bargain and sale requires enrolment to give it validity, which enrolment must be made within six months (which means lunar months) from the date, in one of the courts of record at Westminster, &c.: (27 Hen. 8, c. 16; Will. Real Pro. 150, 4th edit.) A disentailing assurance must also be enrolled in Chancery within six calendar months after execution: (3 & 4 Will. 4, c. 74, s. 41; Browell's Real Pro. Stats. 97.) So conveyances under the Statute of Mortmain must be enrolled within six months from their execution: (9 Geo. 2, c. 36.)

Q.—What would be the consequence of the omission to enrol a bargain and sale within the proper time?

A.—The omission to enrol the deed within the proper time will render it inoperative: (2 Hughes' Pract. Sales Real Pro. 159, 2nd edit.)

Q.—In what cases is enrolment essential to the validity of a grant of an annuity?

A.—It is now no longer necessary to enrol them in any case, as the 17 & 18 Vict. c. 90 (the statute for the repeal of the Usury Laws), repealed the statutes which required their enrolment: (Will. Real Pro. 271, 4th edit.) But, if registered in a similar manner to a judgment, they are a charge on the lands in the hands of the purchaser thereof: (see 13 Vict. c. 15, s. 13.) Annuities given by will, however, are exempted from this act: (s. 14; and see Hughes' Pract. Conv. 164.)

Q.—State the general effect of the statute 27 Hen. 8, c. 16, called the Statute of Enrolment, and to what species of deed it applies?

A.—The statute 27 Hen. 8, c. 16, requires every *bargain and sale* of any estate of inheritance or freehold to be made by deed indented and enrolled within six months from the date in one of the courts of record at Westminster, or before the *justices rotulorum* and two justices of the peace and the clerk of the peace for the county in which the lands



lay, or two of them at least, whereof the clerk of the peace should be one : (Will. Real Pro. 150, 4th edit. ; Burton's Comp. pl. 139 ; 1 Steph. Com. 493.) The act contains an exception of lands, &c. lying within cities, boroughs, or towns-corporate, where any officers have authority, or have lawfully used to enrol any evidences, deeds, &c. : (Burton's Comp. *ubi sup.*)

## HUSBAND AND WIFE.

**Question.**—What are the rights of a husband with respect to his wife's real estate ?

**Answer.**—By the act of marriage, the husband and wife become in law one person, and so continue during the coverture ; accordingly the husband is entitled to the whole of the rents and profits which may arise from his wife's lands, and acquires a freehold estate therein during the continuance of the coverture, and he may, by the 19 & 20 Vict. c. 120, make leases of it. If the husband survives his wife, he will, in case he has had issue by her born alive, that may by possibility inherit the estate as heir, become entitled to an estate for the residue of his life in such lands and tenements of his wife as she was solely seised of in fee simple or fee tail in possession. But no act of the husband only, during the coverture, shall in any wise be prejudicial to the wife or her heirs, or to such as have a right to the lands by the death of the wife : (Will. Real. Pro. 182, *et seq.* 4th edit.)

**Q.**—If the wife be seised in fee of lands, and she die leaving her husband surviving, what interest does the husband take ?

**A.**—In such a case he will, if he has had issue by her born alive, that may by possibility inherit the estate as her heir, become entitled to an estate for the residue of his life in such lands and tenements of his wife as she was solely seised of in fee simple (or in fee tail) in possession ; and is called tenant by the *curtesy* of England : (Will. Real Pro. 185, 186, 4th edit.)

**Q.**—What interest and power does the husband take in and over the following property of the wife : her personalty in possession, her chattels real, her *choses in action* ; and what effect has the death of husband and wife, or wife, on this interest ?

**A.**—The wife's personal chattels in possession belong to the husband absolutely, with the exception of her *paraphernalia*. As to the chattels real, the husband becomes by the marriage possessed of them in her right, and he is entitled not only to the profits and management of them during their joint lives, but he may also dispose of them as he pleases during the coverture, and they are liable for his debts ; and if he survive her, they are absolutely his. But he cannot devise them by will ; and if he make no disposition of them in his lifetime, and she survive him, they go to her, and not to his executors. The wife's *choses in action* do not become the husband's until he reduces them into possession ; and if he dies before this is done, they remain to the wife ; so, if she dies before he has reduced them into possession, they form part of her estate, to which the husband is entitled to administer, and so become the owner thereof : (see 2 Steph. Com. 240, *et seq.* ; Will. Per. Pro. 273, *et seq.*)

**Q.**—If a husband and wife mortgage the leasehold estate of the wife, to whom will the equity of redemption belong if the husband survive the wife ; and to whom, if the wife survive her husband ?

**A.**—Each will take it by survivorship : (see Will. Real Pro. 336, 4th edit. ; Co. Litt. 46 b, 351 a ; Smith's Man. Eq. Jur. 275, 3rd edit.)

**Q.**—State the nature and principal incidents of "separate estate."

**A.**—Whenever real or personal estate is given, granted, or devised to, or settled on a woman, either with or without the intervention of trustees, whether after marriage, or as a provision for marriage, or not in contemplation of immediate marriage, and whether by her husband or by a mere stranger, it will be deemed separate estate, if it appear beyond reasonable doubt that the property was intended for her separate use : (Story's Eq. Jur. § 1380, 1381, 1384.) It is an incident of separate estate that it is free from the control and debts of the husband ; and, in order more completely to protect the wife, the Court of Chancery allows it to be so tied down, that she shall not have power during the coverture to anticipate or assign her income. In this instance, therefore, an exception is allowed to the general rule, which forbids any restraint to be imposed on alienation : (Will. Real Pro. 183, 4th edit.) But the separate use clause, either with or without a restraint against anticipation, will be confined to the then existing or then intended coverture, unless a contrary intention plainly appears : (Smith's Man. Eq. Jur. 378, 4th edit. ; Burton's Com. Pl. 1292, n ; and see *Norris v. Norris*, 29 L. T. Rep. 275.)

**Q.**—How does a married woman convey her estate in freehold, since the statute for the abolition of fines and recoveries, and what are the requisites ?

**A.**—The 3 & 4 Will. 4, c. 74, provides that a married woman may now convey simply by deed ; but, to render such an assurance valid, it is necessary that not only husband and wife should concur therein, but also that she should be examined separate and apart from her husband, either before a judge, which now includes a County Court judge (19 & 20 Vict. c. 108), or master in Chancery, or by two commissioners appointed under the act, as to her freedom and consent, in addition to which the deed must be duly acknowledged by her, and the acknowledgment must be indorsed on the deed : (see Hughes' Pract. Conv. 237, 238 ; Will. Real Pro. 189, 4th edit.)

**Q.**—Does the statute apply to the equitable as well as to the legal estate of a married woman, or to leaseholds for years ?

**A.**—The statute applies to both legal and equitable estates : (see sect. 77 ; Sug. Real Pro. Stats. 239, 242, 243 ; 1 Steph. Com. 538.) The husband may alone absolutely dispose of his wife's leaseholds for years ; unless they be settled to her separate use : (Will. Real Pro. 336, 4th edit.)

**Q.**—What is requisite to make effectual the deed of a married woman not relating to her separate estate ?

**A.**—Both husband and wife must concur therein ; she must be examined separate and apart from her husband as to her consent, before a judge or master in Chancery or by two commissioners ; in addition to which the deed must be duly acknowledged by her : (1 Hughes' Pract. Conv. 238 ; Will. Real. Pro. 189, 4th edit.)

**Q.**—Can separate estate be limited to an unmarried woman ?

**A.**—Yes ; separate estate may be limited to a woman, although not in

contemplation of immediate marriage : (Story's Eq. Jur. § 1384; Smith's Man. Eq. 367, 3rd edit.)

**Q.**—Can a married woman dispose of a reversionary interest in a sum of money ; and has the law as to this been changed, and in what respects ?

**A.**—Prior to the 20 & 21 Vict. c. 57, a married woman could not, either with or without her husband's concurrence, effectually have passed her reversionary interest in personal chattels (see Story's Eq. Jur. §§ 1412, 1413) ; but by this act a married woman may, after the 31st Dec. 1857, by deed, dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever to which she shall be entitled under any instrument made after the said 31st Dec. 1857 (except personal estate settled upon her by any settlement or agreement for a settlement made on her marriage), and also to release and extinguish any power which may be vested in or limited to her in regard to any such personal estate, as fully and effectually as if she were a *feme sole*, &c. The deed must be acknowledged by the married woman in the manner required by the 3 & 4 Will. 4, c. 74, as to deeds passing real estate : (20 & 21 Vict. c. 57.)

**Q.**—A married woman by deed, enrolled and acknowledged and executed by her and her husband, conveys and assigns her reversionary interest in real and personal estate to a purchaser for valuable consideration. What is the effect of this deed on the real, and what on the personal ?

**A.**—The assignment will be good as to her reversionary interest in real estate : (see 1 Steph. Com. 458, 459, 3rd edit. ; Sug. Real Pro. Stats. 239.) As to the assignment of her reversionary interest in personal estate, see preceding answer.

**Q.**—Can a husband convey his wife's reversionary leaseholds for years with or without his wife, or her reversionary interest in personal chattels ?

**A.**—The husband may, and always could, without his wife's consent, convey her reversionary leaseholds for years : (Story's Eq. Jur. § 1410, 1413.) As to the latter part of this question, see *supra*.

**Q.**—Money in the funds and on mortgage is settled on A. for life, remainder to B., a *feme covert*, absolutely. Can B., with or without her husband, by any and what means, pass her reversionary interest to a purchaser ?

**A.**—Neither the money in the funds nor on mortgage (unless, indeed, the equity of redemption was foreclosed) could have been effectually disposed of to a purchaser (Story's Eq. Jur. § 1413, note ; Will. Per. Pro. 278, 279) ; but now if it come within the provisions of the 20 & 21 Vict. c. 57, it may.

**Q.**—If property be given to a married woman for her separate use, with a clause against anticipation, and her husband die, what will be her power over the property ?

**A.**—She will have the absolute dominion over the property : (Smith's Man. Eq. Jur. 378, 4th edit.)

**Q.**—If property be given to the separate use of a woman then unmarried, will the restriction be valid on her subsequent marriage ?

**A.**—Yes ; property may be secured to an unmarried woman, with a

clause against anticipation, and in such a case it will be good against the marital rights of any future husband : (Story's Eq. Jur. § 1384 ; Smith, *ubi supra*.)

**Q.**—A lady possessed of personalty, and with various debts owing to her, marries ; what interest and control does the husband acquire by the marriage in and over the personalty and debts owing respectively during the coverture, or in the event of his surviving her ?

**A.**—By the marriage the wife's personal chattels will go to the husband absolutely, with the exception of her *paraphernalia*, which the wife may retain against the husband's representatives in case she survive him. In regard to her chattels real, the husband may dispose of them at any time during the coverture, but he cannot devise them by will. As to the debts owing (*choses in action*), they do not become the husband's until reduced into possession, and if he dies before this is done, they remain to the wife ; so, if she dies before they are reduced into possession, they form part of her estate, to which he may administer, and so obtain them : (Will. Real Pro. 336, 4th edit. ; 2 Steph. Com. 240, *et seq.* ; Will. Per. Pro. 273 ; Story's Eq. Jur. §§ 1376, 1377, 1413.)

**Q.**—In what cases must the husband obtain letters of administration in order to obtain his wife's chattels real, or personal ?

**A.**—To entitle the husband to the chattels real of the wife, which were not vested in his possession, in her right, in her lifetime, he must make himself her representative by becoming her administrator ; also, if he has not reduced her *choses in action* into possession during her life, he must take out administration to become entitled : (Allnut's Wills & Adms. 233, 248, 3rd edit.)

**Q.**—When property is limited (not in contemplation of marriage) to the separate use of an unmarried woman, without power of anticipation, what are her rights in such property while she remains unmarried, and what are the rights of those of her husband in it, if she subsequently marries without a settlement ?

**A.**—When property is limited (not in contemplation of immediate marriage) to the separate use of an unmarried woman, without power of anticipation, she is not prevented from disposing of the property while she continues unmarried : (Burton's Comp. 434, note b. 7th edit.) And if she afterwards marries without a settlement, the clause against anticipation will operate, and the property will be free from the husband's marital rights : (Story's Eq. Jur. § 1384 ; Smith's Man. Eq. Jur. 371, 3rd edit.)

**Q.**—Can a married woman by any and what means sever a joint tenancy of real estate ?

**A.**—Yes, she may sever a joint tenancy ; for the statute 3 & 4 Will. 4, c. 74, empowers her to dispose of any estate which she, either alone, or she and her husband, in her right, may have in lands of any tenure : (see 1 Steph. Com. 458, 459, 3rd edit.) This must be done by deed and accompanied with the formalities required by the act : (see *ante*, p. 194.)

**Q.**—Can a husband act to any and what extent for his wife as executrix without her consent ?

**A.**—The husband may, without his wife's consent, release debts due to the deceased, or make assignments of the deceased's personal estate ; for, as the general rule of law is that a husband and wife are but one person,

the power, and with it the responsibility, are vested in the husband: (see Will. Per. Pro. 238, 239.)

## SETTLEMENTS.

*Question.*—What is understood by “uses in strict settlement”?

*Answer.*—When estates are limited to the use of the parent for life, and after his death to the use of his first and other sons successively in tail, the uses are said to be in strict settlement: (1 Steph. Com. 317, 3rd edit.)

*Q.*—State the principal provisions of the Settled Estates Act, 19 & 20 Vict. c. 120.

*A.*—The principal provisions of the Leases and Settled Estates Act are to empower the Court of Chancery in certain cases and under certain conditions, and with the consent of certain persons, to authorise leases and sales of settled estates; also to empower tenants for life to grant leases for twenty-one years, which will bind those in remainder.

*Q.*—In a settlement of real and personal estate, what powers would you recommend to be given to the trustees with regard to each kind of property?

*A.*—In a settlement of real estate the powers given to trustees are usually the following: power to make partition, if the property is held in undivided shares; and to sell and repurchase, and to invest moneys arising from the sale until such repurchase can be made; to make exchanges; also powers to raise portions for younger children; to make leases and give receipts, and appoint new trustees. In settlements of personal estate the powers usually run thus: to invest the property in Government or real security; and to vary the investment, if necessary. And when bonds, notes, or other personal securities are assigned: powers to sue for and enforce payment of such debts and securities, and to give effectual releases and discharges for the same; also powers to compound and compromise debts, or take securities for the same; also to refer to arbitration disputes respecting them, and to appoint new trustees: (see Prid. Conv. 529, &c. 2nd edit.; Hughes' Pract. Conv. 371, &c.)

*Q.*—You are instructed to prepare the marriage settlement on the marriage of a client, and the property to be settled consists of money in the funds belonging to the wife. State the general provisions which should be made by the settlement in such a case.

*A.*—The fund should in ordinary cases be vested in trustees upon trust to pay the interest, dividends and annual proceeds thereof to the wife for life, without power of anticipation, on her separate receipt, and independently of her husband; remainder to the husband for life, with power of appointment to the survivor of husband and wife among the children of the marriage; a special provision in favour of the children in default of appointment; and a general power of appointment to the survivor in default of issue of the marriage: (Prideaux's Conv. 532, &c. 2nd edit.)

*Q.*—Upon an intended marriage, it is proposed that the income of the personal property of the wife shall be settled upon the husband for life, if it can be secured against being affected by any assignment or charge which he may make, and against his creditors. Can this be effectually guarded against, and how?

A.—This may be done by vesting the estate in trustees, upon trust to permit the husband to receive the income until he shall make or execute any assignment, or charge thereof, or until he become bankrupt, or an execution issue against him or his goods, or he become insolvent, or die, with limitations over in favour of the wife or family on the happening of any of the events named ; for marriage is a valuable consideration : (see *Prid. supra* ; Will. Real Pro. 73, 4th edit.)

Q.—On a proposed marriage, where the intended husband is seised in fee of real estate, of the annual value of 1,000*l.*, and the intended wife's fortune is 10,000*l.*, what would be the usual and proper settlement of the intended wife's fortune, and of the husband's real estate ?

A.—In such a case, the usual and proper settlement of the wife's fortune and the husband's real estate would be as follows : limitation to the use of trustees for a term of years, in trust to raise an annuity for pin money for the wife, during the coverture ; then estates are limited for life to the husband, followed by a limitation to the wife of a jointure for her life, if she survive. Then comes a limitation of a term to raise portions for younger children, subject whereto there are limitations to the first and other sons of the marriage in tail. Then follow powers of leasing, of appointment of new trustees, &c. : (Will. Real Pro. 45, 238, 338, 4th edit. ; 1 Martin's Conv. by Davidson, 425 ; Pridgeaux's Conv. 560, *et seq.* 2nd edit.)

Q.—Are there any and what legal or equitable means of binding the real property of an infant, on his or her marriage, so as to insure a settlement being made on his or her attaining twenty-one ?

A.—Formerly, nothing save a private act of Parliament could have effected such an object (1 Fonb. Eq. 81, note) ; but now, by stat. 18 Vict. c. 43, infants may, with the approbation of the Court of Chancery, make valid and binding settlements or contracts for settlement of their real estate upon marriage. But the act is not to apply to male infants under twenty years of age, or females under seventeen years of age.

Q.—Can an infant tenant in tail, or an infant having a power of appointment over property, make a valid settlement in all events ? And, if not, state the events upon the happening of which the settlement would be void.

A.—The 18 & 19 Vict. c. 43, does not empower infants to execute powers when it is expressly declared that the same shall not be executed by them. But the acts of an infant are not void, but voidable only ; therefore, if he were to execute a power of appointment or a disentailing assurance, he might confirm it or avoid it on coming of age. If the infant should die under age, the appointment or assurance would be absolutely void.

Q.—Supposing A. to be engaged in a precarious trade and about to marry, what clause would you introduce into the settlement, in order to protect the wife and children ?

A.—Where the intended husband is engaged in trade, in the settlement on the marriage, the wife's property should be so settled as to go over to her and her children on her husband's bankruptcy or insolvency : (Arch. Bank. 234, 8th edit. *et supra*.)

Q.—A female who is under age, and entitled to both real and personal estate, marries : what effect have the articles executed previous to her marriage on her personal, and what on her real, estate ?

A.—An infant could not formerly have bound her real estate by articles executed previous to her marriage (1 Fonb. Eq. 81, note) ; but

now, by the 18 Vict. c. 43, infants may, with the approbation of the Court of Chancery, make valid and binding settlements, or contract for settlement of their real or personal estate, upon marriage. But the act is not to apply to male infants under twenty years of age, or to any female infant under the age of seventeen years. But a female infant could always have made a binding settlement of her personal estate : (see Will. Per. Pro. 271.) *assuming the wife has been to*  
*for it is a matter of fact of the husband's consent.*

Q.—A. covenants by marriage settlement that he will, within three years from the marriage, settle real estates of the value of 10,000*l.* upon certain trusts for the benefit of his intended wife, and the children of the marriage ; no particular estates are specified in the covenant : at the time of the settlement A. had two real estates only, each worth 5,000*l.*, which he afterwards conveyed to purchasers ; to one within, and to the other after, the expiration of the three years : the wife and a child of the marriage were living at the time of both the conveyances, and both the purchasers knew that fact, and were also aware of the covenant, and that A. had no other real estates. Has the wife or child any, and what, claim on the two estates, or on either, and which of them ?

A.—Under these circumstances the wife and children will, it seems, be creditors by specialty only ; for it is a general rule, although it may not hold universally true, that a covenant to convey and settle lands (no particular lands being specified) will not be a specific lien on the lands of the covenantor, but the covenantee will be a creditor by specialty only : (Sug. V. & P. Conc. View, 563, but see p. 561, *id.* ; Story's Eq. Jur. § 1249 ; Smith's Man. Eq. Jur. 148, 3rd edit.) *purchase land for the purpose of settling any part of the same*

Q.—If a settlement by deed or will does not contain the usual powers of sale and of appointing new trustees, how are these defects to be respectively remedied ?

A.—The stat. 19 & 20 Vict. c. 120, empowers the Court of Chancery, on application being made for that purpose, to authorise the sale of settled estates when the instrument of settlement contains no power to that effect. The application may be made by the tenant for life, or for any greater estate, or years determinable on his death, by petition in a summary way. The application is to be with the consent of the tenant in tail if of full age, or the first of them if there are several, and of all persons having prior estates to such tenant in tail, whether as trustees or otherwise ; but if the consent of any person be refused or cannot be obtained, not having an estate of inheritance, the court has the power to dispense with such consent : (see sects. 11 to 18.) This act does not provide for the appointment of new trustees (save as by sect. 23), but by the 13 & 14 Vict. c. 60, it is enacted, that whenever it shall be expedient to appoint new trustees, and it is found impracticable to do so without the assistance of the Court of Chancery, it shall be lawful for the said court to make an order appointing new trustees : (see sect. 32.) Applications under this act may be made by petition in a summary way. And by orders of April 1850, where a deed contains no power to appoint new trustees, application may be made to the court by claim for this purpose.

Q.—Upon the appointment of new trustees, where the trust property consists of both realty and personalty, how is the legal ownership in each description of property to be conveyed so as to vest it in the new and continuing trustee jointly ?

A.—The realty, to vest the legal ownership in the trustees, must be conveyed unto and to the use of the trustees, and to a third person to their

use, when the Statute of Uses will give them the legal estate. The remaining trustee, or the person who has the legal estate, must convey. As to personalty, if it consists of stock, &c., it is sufficient to transfer the stock, &c. into the names of the trustees. If the property be leasehold, it is assigned over to a third person, who reassigns it to the new and continuing trustee. It is, however, by the 22 & 23 Vict. c. 35, enacted, that any person shall have power to assign personal property, now by law assignable, including chattels real, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another : (sect. 21.)

### APPOINTMENT.

*Question.*—When a power is executed by will, at what point of time does it take effect; and would there be any difference in this respect if the power were executed by deed with a power of revocation to the appointor?

*Answer.*—The appointee will only take from the death of the party executing the power in the case of a will (7 Will. 4 & 1 Vict. c. 26, s. 24); and it would seem also in the case of a deed (see Co. Lit. 271 b. n. 1; Burton's Comp. pl. 787, *et seq.*); still when executed by deed, the deed will take effect from the time of execution, although liable to be revoked just as a will, and the donee can have no indefeasible title till the death of the donor.

*Q.*—Where a power of appointment over real estate is executed, from whom does the appointee immediately take in point of estate, viz., the party creating the power, or the party executing it? And state the reason.

*A.*—The appointee takes from the party creating, and not from the party executing, the power; because no estate, but a use is only passed from the party executing the power, and estates, created by the execution of a power, take effect in precisely the same manner as if created by the deed which raised the power: (Sug. Pow. ch. 5, s. 8; Burton's Comp. pl. 346, 787; Will. Real Pro. 255, 4th edit.; 1 Steph. Com. 507.)

*Q.*—When under a settlement or will a father has a power to appoint among all his children as he may think fit, will an appointment which leaves out one or more of such children be effectual, or is it necessary he should appoint a share to each, and if so, must such share be a substantial, or may it be a merely nominal one?

*A.*—A father, who has the power of appointing among all his children, cannot leave out one or more of such children, as that would not be a valid exercise of the power; but the same object may be obtained by appointing a substantial share to one and a nominal share to another: (1 Will. 4, c. 46; 1 Hughes' Pract. Sales Real Pro. 390, 392, 2nd edit.)

*Q.*—In case a father has a power of appointing a sum of money among his children, and in consideration of a sum paid to him by one of such children, he makes an appointment in favour of such child; is the appointment good? And give a reason for your answer.

*A.*—In this case the appointment is bad; the father being in the position of a trustee, who cannot be allowed to stipulate for an advantage to himself by the execution of his trust: (Story's Eq. Jur. § 255.)

*Q.*—In what case it is now necessary that the formalities required by



the instrument creating a power should be observed when the power is exercised; and are there any cases in which other formalities must be substituted?

A.—The Wills Act provides that a will, whether executed in pursuance of a power or otherwise, must be exercised in accordance with the Wills Act, or the will is void: (see 1 Vict. c. 26, s. 10.) And as before shown, a deed is sufficiently executed, <sup>validated</sup> if the terms of the 12th section of the 22 & 23 Vict. c. 35, are complied with: (see fully *ante* p. 183.)

Q.—Before the Wills Act, was there any exception to the rule that required a strict adherence to the prescribed formalities?

A.—Before the Wills Act, the prescribed forms required on the execution of a power must have been complied with in all cases: (see Sug. Pow. 212, *et seq.* 4th edit.)

Q.—Can a person having an absolute power of appointment over real estate, defeat judgments entered up against him subsequently to the vesting of such power in him, in any and what way? And state the reason for your answer.

A.—A person having an absolute power of appointment over real estate cannot defeat judgments entered up against him subsequently to the vesting of such power in him by exercising that power, except in favour of a purchaser for valuable consideration, without notice, because judgment debts are now made binding on all lands over which the debtor shall, at the time of the judgment, or at any time afterwards, have any disposing power which he may, without the assent of any other person, exercise for his own benefit: (1 & 2 Vict. c. 110, ss. 11, 13; 2 Vict. c. 11; 2 Hughes' Pract. Sales Real Pro. 110, 2nd edit.; Will. Real Pro. 245, 246, 4th edit.; Sug. V. & P. Conc. View, 392.)

Q.—Is a purchaser under an appointment, as in the last query, affected, and how, by the statutes for the abolition of arrest on *mesne* process, or any of them?

A.—The 1 & 2 Vict. c. 110, is the act referred to. By this act judgment debts are made a charge on all lands, &c. (including copyhold and customary-hold), of which the judgment debtor is, at the time of entering up of the judgment, or at any time afterwards, seised, possessed, or entitled, for any estate or interest whatever at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which the debtor has a general power, and which is to be binding upon the debtor, *and all persons claiming under him after such judgment*: (sect. 13.) But, before lands in the hands of purchasers can be affected under the provisions of this act, the judgment must be registered pursuant to the act: (sect. 19.) And, when registered, purchasers for valuable consideration without notice are protected: (see references *supra*; and see *ante*, pp. 165 to 168.)

Q.—A. by his will gives B. a power to appoint a sum of money to all, or some, or one of his (B.'s) children, as B. may think fit. B. has several children: one of such children dies in B.'s lifetime, leaving children, being B.'s grandchildren. Is B. authorised under such power to appoint any part of the money to such his grandchildren, or any of them?

A.—B. is not, under this power, authorised to appoint any part of the

money to his grandchildren or any of them : (see Sug. Pow. 252, 7th edit. ; Burton's Comp. pl. 571 and note.)

**Q.**—Suppose an estate being settled upon A. for life, with remainder to such son of his as he should appoint, and A. should appoint to his son B., who had just attained twenty-one, and A. and B. should thereupon mortgage the estate to a third person for money advanced to A., would such a transaction be valid ? State the reasons for your answer.

**A.**—It is a rule of equity that contracts and conveyances whereby benefits are secured by children to their parents, if not entered into with scrupulous good faith, and reasonable under the circumstances, will be set aside unless third persons have acquired an interest under them : (see Story's Eq. Jur. § 309.) If, therefore, in the case put, the contract is tainted with fraud, of which the mortgagee had cognizance, the transaction will be set aside, but not otherwise : (see Smith's Man. Eq. Jur. 67, 3rd edit.)

## TESTAMENTARY ALIENATION.

**Question.**—What is a will ?

**Answer.**—A will or testament is a written instrument by which a person expresses what he *wills* or wishes to be performed after his death. Wills are technically divided into *wills* or *devises*, and *wills* or *testaments*. A will or devise is applied to the disposal of real estate, to take effect after the death of the owner. A will or testament is applied to the disposal of *personal* estate, to take effect after the death of the owner : (see Holth. Law Dic. 3rd edit.) But see 1 Vict. c. 26, s. 1.

**Q.**—At what age may a will of real or personal estate be made ?

**A.**—No person can make a will who is under the age of twenty-one years : (1 Vict. c. 26, s. 7.) But *a will may be made at any time on the day before that which is usually considered as the twenty-first anniversary of the testator's birth*, there being in law no fraction of a day : (Allnutt's Pract. Wills & Adms. 4, 3rd edit.)

**Q.**—Who may make a will, and what persons are incapable of making a will ?

**A.**—All persons except the following are capable of making a will : An infant ; a *feme covert*, except of such property as may be settled to her separate use, or over which she has a power of appointment, or of goods as executrix ; also, if the husband has been banished for life by act of Parliament, an exception occurs. It would also appear that if the husband is transported as a felon for a term of years, the legal disabilities of the wife are during that time suspended.\* The will of an *alien* devising lands is voidable only as he has a defeasible title in the lands, which it appears he may by his will pass to a devisee. A *traitor* is unable to make a will ; this is also the case with a felon against whom sentence of death is recorded ; an idiot cannot make a will ; mental imbecility occasioned by great age or drunkenness will incapacitate a man from making a will ; a person who is born deaf, dumb and blind cannot make a will, though blindness or deafness alone will not render a person incapable ; a *mad or lunatic* person cannot make a will ; but a person found lunatic by commission may make a will during a lucid interval, but the burden of proof of his sanity will lie on the parties who

set up the will: (Allnutt's Pract. Wills & Adms. 4, *et seq.* 3rd edit.) A tenant in tail cannot devise the entailed property, nor a joint tenant the joint property.

Q.—When was the act for the amendment of the law with respect to wills passed, and from what day does it take effect?

A.—The act for the amendment of the law with respect to wills was passed in July 1837, and takes effect from the 1st day of Jan. 1838: (1 Vict. c. 26, s. 34.)

Q.—State the mode in which a will is required to be executed by the act 7 Will. 4 & 1 Vict. c. 26, for the amendment of the law relating to wills; and has any further alteration been made?

A.—The 1 Vict. c. 26, enacts, that the will must be signed at the foot or end thereof by the testator, or by some person in his presence and by his direction; and the signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary: (s. 9.) The words "at the foot or end thereof" caused much inconvenience, and an act was passed to remedy it (15 & 16 Vict. c. 24); this act enacts that the will shall be valid if the testator's signature shall be placed at or after, or following, or under, or beside, or opposite to the end of the will; so that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will. And no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or that the signature shall be placed among the words of the testimonium, or attestation clause, or shall follow or be after or under, or beside the name or one of the names of the subscribing witnesses, or that the signature shall be on a side or page or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature, or that there shall appear to be sufficient space on or at the bottom of the preceding page, or side, or other portion of the same paper on which the will is written, to contain the signature; but no signature shall be operative to give effect to any disposition or direction which is underneath or follows it, nor to any disposition or direction inserted after the signature shall be made: (sect. 1.) The Wills Act does not extend to wills of personal estate made by sailors and soldiers in certain cases, as provided for by 29 Car. 2, c. 3, and 11 Geo. 4 & 1 Will. 4, c. 20.

Q.—When, and of what property, may a married woman make a will?

A.—A married woman may (if of full age and sound mind) make a will of such property as may be settled to her separate use, or over which she has a power of appointment, or of goods vested in her as executrix. An exception also occurs when the husband has been banished for life by act of Parliament, as to her incapacity to make a will. So if she has obtained an order under the Divorce Act protecting her earnings and property, or has had a judicial separation decreed: (see 19 & 20 Vict. c. 57.) It would appear, also, if the husband is transported for a term of years, the legal disabilities of his wife are for that time suspended: (Allnutt's Pract. Wills & Adms. 4, 5, 3rd edit.) So, by the licence of her husband she may make a will of her *personal* estate, or more properly by his *assent*, for unless he sanctions the particular will in question his previous licence to make one will not avail, as the property is his; and

such assent amounts to no more than a waiver of his general right of administering his wife's effects, so that it will not be effectual unless he happens to survive her, for in that case only could he have been her administrator: (see 2 Steph. Com. 233, 234.)

**Q.**—State the principal enactments of the Wills Act of Jan. 1838, with the alterations in the old law affected thereby.

**A.**—The principal enactments are the following: All persons may dispose by will (with the exceptions mentioned, *ante*, p. 202) of all their real and personal estate to which they are entitled at their death, including estates *pur autre vie*, contingent, executory, or future interests, and also rights of entry upon land. Publication is no longer a requisite. A will is not to be void on account of incompetency of an attesting witness. A will is now revoked by marriage alone; before the Wills Act both marriage and the birth of a child were necessary to cause a revocation. No will or codicil is to be revoked (save as above) but by another will or codicil, or by some writing declaring an intention to revoke the same, and executed in like manner as a will is required to be executed, or by burning, tearing, or otherwise destroying the same with an intention to revoke the same. Before the act the testator must have been seised of the devised lands at the time of making his will, and at his death, to have passed them; a will, however comprehensive, could not have passed after-acquired property; but wills now speak from the testator's death, unless a contrary intention appears. Under this act, also, unless a contrary intention appears, a devise which fails of effect by reason of the death of the devisee in the testator's lifetime, or by reason of such devise being contrary to law or incapable of taking effect, will now fall into the residue, if any, contained in the will, instead of going to the testator's heir-at-law, as it would have done prior to the above act. The words "die without issue," or "die without leaving issue," &c., are to be construed to mean dying without issue living at the death, and not an indefinite failure of issue, unless a contrary intention appears by the will. A devise without any words of limitation is to pass a fee; formerly, a life estate would only have passed without words of limitation. A devise of an estate tail does not now lapse by the death of the person to whom it is given in the testator's lifetime, if he leaves issue who may be capable of inheriting under the entail, living at the testator's death. Nor are gifts to children, or other issue of the testator, to lapse by their death in the testator's lifetime, if they leave issue living at the testator's death. The same formalities are now required in the execution of wills of personal estate as of real estate; formerly, personal estate might have passed by an unattested will. Wills under powers must be executed in the same manner as other wills. Alterations also have been made in the execution and attestation of wills of real estate. The Statute of Frauds required three witnesses to attest the signing, but did not require them to be present at the same time; under the Wills Act only two witnesses are required to attest the signing, but they must all be present at the same time, and the signature must be made or acknowledged by the testator, which was not formerly necessary: (1 Vict. c. 26; Browell's Real Prop. Stats.; 1 Steph. Com. ch. 20.)

**Q.**—Who ought not to be an attesting witness to the execution of a will?

**A.**—The Statute of Frauds required that the witnesses should be credible. The Wills Act, 1 Vict. c. 26, is silent as to the credibility of the

witnesses; and it, moreover, says that the incompetency of any witness at the time of the execution of the will, or at any time afterwards, is not sufficient to invalidate the will: (sect. 14.) If any person, however, attests the execution of a will, to whom, or to whose wife or husband, any beneficial interest shall be given (except a charge for payment of debts), the gift will be void, but the person attesting will be a good witness: (s. 15.) Creditors are good witnesses; so is a person who is appointed executor: (ss. 16, 17; Will. Real Pro. 171, 4th edit.; Steph. *sup.*)

**Q.**—Previously to Jan. 1838, how many witnesses were required to a will of real estate, and how many to a will of personal estate; and what is the present law in regard to each?

**A.**—The Statute of Frauds required three witnesses at least to a will of real estate, but none were necessary in the case of a bequest of personal estate; but by the 1 Vict. c. 26, s. 9. two or more witnesses are required in the testamentary dispositions of both descriptions of property: (Will. Real Pro. 168, 4th edit.; Browell's Real Pro. Stats. 200, &c.; Steph. *sup.*)

**Q.**—What attestation is requisite to the valid execution of a will; and, if a form of attestation be subscribed, what should that form be?

**A.**—The Wills Act requires the will to be attested by two or more witnesses present at the same time, and such witnesses are to attest and subscribe the will in the presence of the testator, but no form of attestation is necessary (sect. 9.) A form of attestation is, however, invariably used; otherwise they may be called upon to prove the several particulars of the execution which may have escaped their recollection. The form generally runs thus: "Signed by the said A. B., the testator, as and for his last will and testament, in the presence of us, present at the same time, who, in his presence, in the presence of each other, and at his request, have hereunto subscribed our names as witnesses. E. F. G. H."

—(Allnutt's Pract. Wills & Adms. 39, 76, 3rd edit.) Also, if a form is not used, the Probate Court will require an affidavit that the will was so executed before they will grant probate: (1 Hughes' Pract. Sales Real Pro. 424, 2nd edit.)

**Q.**—Is it requisite that the testator see the witnesses attest the will?

**A.**—Yes; this is expressly required by the Wills Act: (1 Vict. c. 26, s. 9.) This was also required by the Statute of Frauds: (Will. Real Pro. 168, 4th edit.) But it will satisfy the act if the testator be in such a position that he might have seen the witness attest the will if he chose to look: (see Browell's Real Pro. Stats. 202, and the cases there cited; Lord St. Leonards' Handy Book, 149, 6th edit.)

**Q.**—Must all the witnesses sign their names in the presence of each other?

**A.**—The 9th section of the Wills Amendment Act does not, it will be seen, require that the witnesses should sign in the presence of each other; but it will not be prudent, in any case, that either of the witnesses should leave the room until every requisition of the act is complied with: (Allnutt's Pract. Wills & Adms. 75, 2nd edit.; Sug. Real Pro. Stats. 336.)

**Q.**—If alterations are made in a will previous to the signing, what precautions would you use with respect to them?

**A.**—Alterations in a will previous to executing it should, as a proper precaution, be marked in the margin by the testator and witnesses, and

referred to in the attestation clause: (1 Vict. c. 26, s. 21; Sug. Real Pro. Stats. 341, 347.)

Q.—What is necessary if the testator makes alteration after signing?

A.—The will must be re-executed: (1 Vict. c. 26, s. 21; Sug. Real Pro. Stats. 347.)

Q.—How can the revocation of a will be now effected?

A.—The 1 Vict. c. 26, enacts that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid (meaning marriage, which will now alone revoke a will, formerly marriage and the birth of a child were necessary), or by another will or codicil executed as a will is required to be executed, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same: (sect. 20; Allnutt's Pract. Wills and Adms. 82, *et seq.* 3rd edit.; Will. Real Pro. 171, &c. 4th edit.; 1 Steph. Com. 555.)

Q.—What effect has a codicil properly executed under the 7 Will. 4 & 1 Vict. c. 26, on a will made previously, which would have been good as the law then stood, but not so under this act?

A.—Although a testamentary instrument is not properly executed or attested, yet if it is clearly referred to by one of later date, properly executed and attested, it will be operative, and no particular form of expression is necessary: (Sug. Real Pro. Stats. 339.) Therefore, in the question put, the will will be operative if referred to in the codicil.

Q.—Is a will made before marriage, and consequently thereby revoked, revived by a codicil made after marriage giving legacies, but not referring to the will otherwise than by the introductory words, "This is a codicil to my will"?

A.—If the will and codicil are written on the same paper, or if it can be shown that the testator never made any other will (for which purpose parol evidence is admissible) the reference in the codicil to the will will be sufficient to set up and revive the will; but, in the absence of such proof, the reference would be too vague for this purpose: (see *Allan v. Maddock*, 31 L. T. Rep. 359, where the point is fully considered; see also Sug. Real Pro. Stats. 339; Lord St. Leonards' Handy Book, 151.)

Q.—Will a mortgage in fee operate in law and equity as a revocation of a will made previously?

A.—It will operate as a revocation to the amount of the charge only: (see 17 & 18 Vict. c. 113; *et ante*, p. 162.)

Q.—Suppose a will to devise all the testator's real estate, and the testator, after executing his will, purchase or acquire a freehold estate, and do not subsequently re-execute his will or make any devise of such estate, to whom upon his death will such after-purchased or acquired estate descend?

A.—Formerly a will, however comprehensive in its terms, could not have passed subsequently-acquired property, but it would have devolved upon the heir-at-law. But the 1 Vict. c. 26, enacts, that it shall be lawful for every person to devise, bequeath, or dispose of by his will all real and personal estate which he shall be entitled to, either at law or in

equity, at the time of his death, and which, if not so devised or bequeathed, would devolve upon the heir-at-law, including estates acquired after executing his will: (sect. 3.) Therefore, the after-acquired estate will go to the devisee, and not to the heir: (see Browell's Real Pro. Stats. 195; 1 Steph Com. 550; Will. Real Pro. 168, 4th edit.)

**Q.**—If the testator do not name any executor of his will, who would be entitled to probate?

**A.**—The court, in the exercise of its discretion, considers the right to administration to follow the right to the property. In the case put, therefore, administration *cum testamento annexo* would be granted to the residuary legatee in preference to the next of kin: (Allnutt's Pract. Wills and Adms. 106, 107, 3rd edit.)

**Q.**—In what court or courts should a will of personalty be proved, where the testator leaves *bona notabilia* in different dioceses?

**A.**—Formerly if the testator left *bona notabilia*, or chattels, to the value of a hundred shillings in two distinct dioceses or jurisdictions within the same province, either Canterbury or York, the will must have been proved in the Prerogative Court of that province: (see Allnutt's Pract. Wills and Adms. 97, 2nd edit.) But now the 20 & 21 Vict. c. 77, provides that probate of a will may be granted by a district registrar in the name of the Court of Probate, and under the seal of the district registry, if it appears by affidavit of the person applying for the same, that the testator had at the time of his death a fixed place of abode within the district in which the application is made, the place of abode being stated in the affidavit; and such probate shall have effect over the personal estate of the deceased *in all parts of England*: (see sect. 46.) This section also applies to cases of intestacy. By sect. 47, the affidavit is to be conclusive for the purposes of the grant, and the grant is not to be recalled, &c., even if the testator (or intestate) had no fixed place of abode within the district at his death, and the probate so granted is a protection to all persons dealing with the executor under it. By sect. 59, application may, however, be made to the principal registry, if thought fit: (see Coote's Probate Ct. Pr. 8, *et seq.*)

**Q.**—Can a person be admitted as a witness to prove the execution of a will, or the validity of it, who, or whose wife or husband, takes a beneficial legacy under the will; and will she or he be entitled to the legacy or not?

**A.**—The gift will be void, but this does not prevent the person to whom, or to whose wife or husband, the legacy is given, being admitted to prove the execution or validity of the will: (1 Vict. c. 26, s. 15; Will. Real Pro. 168, 4th edit.; 1 Steph. Com. 554.)

**Q.**—Is there any and what valid objection to an executor or creditor being an attesting witness to the execution of a will?

**A.**—No person on account of his being appointed executor of a will is thereby rendered incompetent to be admitted as a witness to prove its execution. A creditor may also attest the execution of a will, although there may be a charge for payment of debts: (1 Vict. c. 26, ss. 16, 17; and references *supra*.)

**Q.**—Are there any cases in which the interest of a devisee or legatee does not lapse by their death in the lifetime of the testator? And give instances.

**A.**—The act 1 Vict. c. 26, enacts, that where any person to whom any real estate shall be devised for an estate tail, or an estate in *quasi* entail, shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will : (sect. 32.) It further enacts that, where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the testator's lifetime, leaving issue living at the testator's death, such devise or bequest shall not lapse, &c., unless a contrary intention appears by the will : (s. 33 ; Browell's Real Pro. Stats. 215 ; Will. Real Pro. 173, 174, 4th edit.)

**Q.**—Will a lapsed devise of real estate go to the residuary devisee of real estates, if any, or to the testator's heir ?

**A.**—It will fall into and form part of the general residuary estate, and pass accordingly, unless a contrary intention appears ; but if there be no devise of the residue, it will go to the heir-at-law : (1 Vict. c. 26, s. 24 ; Sug. Real Pro. Stats. 367 ; Browell's Real Pro. Stats. 211 ; Will. Real Pro. 173, 4th edit.)

**Q.**—Will a general devise of all testator's real and personal estates pass those vested in him in trust, or by way of mortgage ?

**A.**—Yes ; unless a different intention is to be collected from the context of the will : (see Smith's Man. Eq. Jur. 266, 4th edit. ; *Hall v. May*, 30 L. T. Rep. 64.)

**Q.**—Will a fee simple pass by will to the devisee without words of limitation ; and, if it will pass, cite the authority for your answer ? Would it be the same if the testator died in 1801 or in 1857 ?

**A.**—A fee simple will pass by will, without words of limitation : (1 Vict. c. 26, s. 28.) But this act only applies to wills made after the 1st Jan. 1838 ; therefore, if the testator's will was *made* before 1838, although he died after that time, this act will not apply : (see sect. 34 ; Browell's Real Pro. Stats. 216.)

**Q.**—A. devises lands to B. ; who is heir-at-law. Does B. take by descent or purchase, and has the law on that subject undergone any, and what, recent alteration ?

**A.**—Under the old law, a devise by a testator to his heir-at-law would have been void, the heir in such case taking by descent. But by the 3rd section of the 3 & 4 Will. 4, c. 106, the heir in such a case is to take by purchase and not by descent : (see 1 Steph. Com. 399 ; Will. Real Pro. 181, 4th edit.)

**Q.**—A testator seised in fee of lands, and also of the tithes of them, devises the lands without expressly including or showing his intention to include the tithes. Will the latter pass to the devisee of the land ?

**A.**—The ownership of both tithes and the lands out of which they issue by the same person will not have the effect of merging the one in the other ; consequently, they will not pass under the devise of the lands, unless, indeed, they have been merged under the Tithe Commutation Act : (Will. Real Pro. 284, 285, 4th edit.)

**Q.**—A testator devises real estate to A. for life, with remainder over



to A.'s first and other sons successively in tail male, with remainder over to testator's own right heirs. Under such a devise, when does the ultimate remainder become vested in the heirs of the testator, viz., at his (the testator's) decease, or at the time of the failure of the prior limitations?

A.—The ultimate remainder becomes vested at the testator's decease.

Q.—An estate, consisting partly of freehold and partly of leasehold, is devised to A. for life, with remainder to B. for life, with remainder to the heirs of the body of A. What interest does A. take in the freehold and leasehold respectively?

A.—If an estate consisting partly of freehold and partly of leasehold be devised to A. for life, remainder to B. for life, with remainder to the heirs of the body of A., A. will take an estate tail in the freeholds under the rule in *Shelly's* case; subject, of course, to B.'s life estate: (see Will. Real Pro. 211, 115, 4th edit.; 1 Steph. Com. 319, 3rd edit.; Burton's Comp. pl. 336; *et ante* p. 117.) As to the leaseholds, the rule in *Shelly's* case does not apply, but A. will take them absolutely; however, if B. should survive A., he will then take his interest.

Q.—What is a vested and what a contingent legacy? -

A.—A legacy is said to be vested when the words of the testator convey a present or immediate interest to the legatee in the legacy; but if the legacy is only to be paid on the happening of some contingency, as, if the legatee attains twenty-one, it is contingent, and if the legatee dies before that age, the legacy lapses: (Holth. Law Dic.; Matthews' Guide to Exec. & Adms. 184, 2nd edit.)

Q.—A., by his will, gives and bequeaths a legacy of 200*l.* to B. (a stranger), and directs his executors to pay it on B.'s attaining twenty-one. B. dies under twenty-one, and after the death of A. Who is entitled to the legacy, and why?

A.—Under a bequest of this sort B.'s representatives will be entitled to the legacy. For a bequest to A., "to be paid" or "payable" *at* or *when* he attains twenty-one (or any other time mentioned), it is vested; but if it be "to A. *at* twenty-one," or "*if*," "*when*," "*in case of*," or "*provided*" he attains twenty-one, it is contingent. If the testator intended that the legatee should at all events have the legacy, but that he should wait for it till the time named, it is a vested interest, and he may dispose of it before the time; but if the testator meant that there should be no gift at all unless the object of his bounty lived to the time named, it is contingent: (see Matthews' Guide to Exec. & Adms. 184, 2nd edit.)

Q.—A testator bequeaths the residue of his personal estate to several persons as tenants in common; two of the residuary legatees die in the lifetime of the testator: what becomes of their shares?

A.—Their shares will lapse; but it would have been otherwise if given to the residuary legatees as *joint* tenants: (see Will. Per. Pro. 253, 254; Sug. Real Pro. Stats. 367.)

Q.—What is an executory devise?

A.—It is such a limitation of a future estate or interest in property as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law. As, if lands be devised to A., an infant, and his heirs, but in case A. should die under the age of

twenty-one years, then to B. and his heirs. This remainder, though void in a deed (which operates by virtue of the common law, although good by way of shifting use), is good at common law by way of executory devise : (see Will. Real Pro. 257, *et seq.* 4th edit ; 1 Steph. Com. 588, 3rd edit.)

Q.—Within what time must it be provided that the contingencies of an executory devise shall happen ?

A.—The contingencies must happen within the period of any fixed number of existing lives, and an additional term of twenty-one years ; allowing further for the period of gestation, should gestation actually exist : (Will. Real Pro. 262, 4th edit. ; 1 Steph. Com. 156, *et n.*)

Q.—State the law against perpetuities.

A.—The law against perpetuities prevents property from being tied up or fixed as to its future destination for a longer period than a life or lives in being and twenty-one years afterwards, with a future period of a few months during gestation, supposing gestation to exist : (Will. Real Pro. 46, 262, 4th edit. ; Allnutt's Wills & Adms. 48, *et seq.* 3rd edit. ; 1 Steph. Com. 509.)

Q.—What is the utmost duration for which a testator can by his will create a valid trust, to accumulate the rents and profits of his real or personal estate ?

A.—The stat. 39 & 40 Geo. 3, c. 98 (commonly called the Thellusson Act), forbids the accumulation of the income of real or personal estate for any longer period than the life of the grantor or settlor, or twenty-one years from the death of such grantor, settlor, devisor, or testator, or during the minority of any person living, or in ventre sa mère at the death of the grantor, devisor, or testator, or during the minority only of any person, who, under the settlement or will, would for the time being, if of full age, be entitled to the income so directed to be accumulated. But the act does not extend to any provision for payment of debts, or for raising portions for children, or to any direction touching the produce of timber or wood : (Will. Real Pro. 263, 264, 4th edit. ; Allnutt's Pract. Wills & Adms. 53, 54, 3rd edit. ; 1 Steph. Com. 511.)

Q.—If the trust as created should exceed the period beyond which accumulations of the income of trust property are by law prohibited, will it fail altogether, or how otherwise ?

A.—It has been held that a disposition exceeding the limits allowed by the act is only void for the excess beyond twenty-one years : (see Allnutt's Pract. Wills & Adms. *ubi sup.* ; Will. Real Pro. *ubi sup.*)

Q.—What is the effect of the Statute of Mortmain ?

A.—By the statute 9 Geo. 2, c. 36, all conveyances and settlements (including gifts by will) *of lands, &c.*, or of money, or of other personal estate *to be laid out in the purchase of lands, &c.* for any *charitable uses* whatever are void, unless made by deed indented, sealed and delivered in the presence of two credible witnesses twelve calendar months at least before the death of the donor or grantor, and enrolled within six calendar months after execution ; and unless the same be made to take effect in possession for the charitable use intended immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, &c. for the benefit of the donor, &c. Certain public bodies are exempted : (see Will. Real Pro. 60, 4th edit. ; Allnutt's Pract. Wills & Adms. 34, *et seq.* 3rd edit.)

**Q.**—A testator possessed of money in the funds, money out on mortgages of freehold and leasehold estates, railway shares, and other effects, desires to bequeath a legacy to a hospital; how ought the will to be framed to render the bequest effectual?

**A.**—The legacy may be made payable out of any of these funds, except the money out on mortgage, for with this exception they are not within the Statute of Mortmain (9 Geo. 2, c. 36): (see *Rop. Leg.* 670, &c. 4th edit.; *Matthews on Exors. tit. "Legacies."*)

**Q.**—Can freehold lands be devised by will to charitable uses; or can money be bequeathed by will to be laid out in the purchase of land to be settled to charitable uses?

**A.**—Neither freehold lands can be devised to charitable uses nor money bequeathed by will to be laid out in the purchase of land to be settled to charitable uses: (see 9 Geo. 2, c. 36; *et sup.*)

**Q.**—Does a will executed (since the late Statute of Wills) in the presence of two witnesses pass real estate in the British Colonies or any of them?

**A.**—In all the colonies, except Lower Canada, British Guiana, the Cape, Ceylon, Trinidad, St. Lucia and Mauritius, real property is subject to the power of disposition which the law authorised before the passing of the Statute of Wills; and the disposition by testament of moveable property is subject to the same law which existed in the parent state. This statute will not be in force in the colonies until it is adopted by their legislature. Where, therefore, the testator has colonial property, the attestation (to the will) should in most cases contain the word "published," and should be by three witnesses: (see *Browell's Real Pro. Stats.* 204.)

**Q.**—You are required to prepare the will of a client; his property consists of 5,000*l.* in the funds, and a freehold estate of 5,000*l.* a year. He wishes to leave a life interest in the whole to his wife, to secure 20,000*l.* to his younger children, and to make a strict settlement of the freehold estate upon his eldest son and his issue. What would be the best mode of carrying the testator's intentions into effect by a will?

**A.**—The whole must be devised to trustees upon trust to pay the rents, dividends and proceeds to the wife during her life; and, after her death, upon trust to raise sufficient to satisfy the provisions for the younger children; and, subject thereto, to the eldest son for life, with remainder to his first and other sons in tail; remainder to his daughter in tail; with remainders over according to the testator's directions: (see *Will. Real Pro.* 45, 238, 338, 4th edit.)

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## INTESTACIES.

**Question.**—What is the meaning of the term "dying intestate"?

**Answer.**—The meaning of the term "dying intestate" is when a person has died without making a will: (see *Holth. Law Dic.* 2nd edit.)

**Q.**—If a man dies intestate, leaving a wife and children, how is his personal estate to be distributed?

**A.**—One third to the wife, residue to the children equally: (*Stat. Distr.*

22 & 23 Car. 2, c. 10; Will. Per. Pro. 262; 2 Steph. Com. 251; and for a Table of Distributions see Allnutt's Pract. Wills & Adms. 3rd edit.; Coote's Probate Ct. Pract. 83.)

**Q.**—If he leaves no children, but a widow, a brother, and children by another brother or sister, how is the personal estate distributed?

**A.**—Half to wife, residue to the brother and children by another brother or sister: (see Will. Per. Pro. 262; 1 Steph. Com. 251; Coote's Probate Ct. Pr. 83.)

**Q.**—If a person dies intestate, leaving a widow, one child, the children of a deceased child, and a brother and sister, in what manner will the intestate's personal estate be distributed?

**A.**—The widow is entitled to one third, and the child and grandchildren take the residue, the grandchildren taking *per stirpes*: (22 & 23 Car. 2, c. 10; Steph. Com. *supra*; Coote, *supra*.)

**Q.**—If a man die intestate, leaving a widow, one child and a grandchild, how is his personal estate distributed?

**A.**—One third to widow, residue to the child and grandchild equally: (22 & 23 Car. 2, c. 10, s. 5; Steph. Com. *supra*; Coote, *supra*.)

**Q.**—An intestate dies without leaving a widow, or any issue, leaving nephews, the children of a deceased brother or sister of the intestate, and great nephews, the descendants of another deceased brother or sister of the intestate: who are entitled to share in the distribution of the personal estate?

**A.**—The nephews will be entitled to the intestate's personal estate, and the great nephews will be wholly excluded. Because the 22 & 23 Car. 2, c. 10, s. 7, provides "that there be no representations admitted among *collaterals* after brother and sister's children:" (see Allnutt's Wills & Adms. 372, 379, 3rd edit.; Steph. Com. *supra*; Coote's Probate Ct. Pr. 83, 84.)

**Q.**—If an intestate dies leaving a deceased brother's daughter and two grandchildren of a deceased sister, how would the surplus be divided?

**A.**—The whole will go to the deceased brother's daughter, for the reason above stated: (see 22 & 23 Car. 2, c. 10, s. 7.; Allnutt's Pract. Wills & Adms. *supra*; Steph. Com. *supra*; Coote, *supra*.)

**Q.**—If a person dies intestate, without leaving father, wife, or child, but leaving a mother, a brother and two children of a deceased brother, how would the surplus of the intestate's estate be distributed?

**A.**—A third to the mother, another third to the brother, and the remaining third to the two children of the deceased brother, they standing *in loco parentis*: (see 1 Jac. c. 17, s. 7; Will. Per. Pro. 262; Steph. Com. *supra*; Coote, *supra*.)

**Q.**—How is the disposition of the personal estate of an intestate Englishman domiciled in France regulated?

**A.**—The disposition of the personal estate of an Englishman domiciled in France will be governed by the French law. But according to the French law, mere residence does not give a domicile in France: (see *Bremer v. Freeman*, 28 L. T. Rep. 37.)

**Q.**—What is the order in which next of kin are entitled to letters of administration?

**A.**—The intestate himself is the *terminus à quo* the several degrees

are numbered, and not the common ancestor, according to the rules of the canonists, by which the descents of real estates are regulated. Therefore, in the first place, the children and their descendants, or, on failure of children, the parents of the deceased, are entitled to the administration; both parents and children are indeed in the first degree, but with us the children are allowed the preference. Then follow brothers, grandfathers, uncles or nephews, and the females of each class respectively; and lastly, cousins. The half blood is admitted to the administration as well as the whole; for they are of the kindred of the intestate. Therefore, the brother of the half blood shall exclude the uncle of the whole blood: (Allnutt's Wills & Adms. 174, 3rd edit.; and see Coote's Probate Ct. Pract. 82.)

Q.—State when the next of kin take *per stirpes*, and when *per capita*?

A.—If *all* the intestate's children die in his lifetime, leaving issue, such issue will take *per capita*, that is, in their own right. But if *some* only of the intestate's children die in his lifetime, leaving issue, then the issue will take *per stirpes*; they now claiming by *representation* and *not* in their own right: (Allnutt's Pract. Wills & Adms. 375, 3rd edit.; 2 Steph. Com. 253.)

Q.—Is there any, and if any, what difference between the distributive share of an intestate's effects taken by brothers and sisters of the half blood and whole blood?

A.—A brother or sister of the half blood is equally entitled with one of the whole blood: (Allnutt's Pract. Wills & Adms. 374, 3rd edit.)

Q.—In case of intestacy as to real estate, to whom will it descend?

A.—To the intestate's heir-at-law: (Will. Real Pro. 57, 58, 4th edit.)

Q.—What is the difference between an heir apparent and an heir presumptive?

A.—An heir apparent is the person who, if he survives the ancestor, must certainly be his heir, as the eldest son in the lifetime of his father. An heir presumptive is the person who, though not certain to be heir, at all events, should he survive, would yet be the heir in case of the ancestor's immediate decease. Thus, an only daughter is the heiress presumptive of her father, but whose present hopes may be hereafter cut off by the birth of a son: (Will. Real Pro. 74, 75, 4th edit.; 1 Steph. Com. 358.)

Q.—Explain the doctrine of "*possessio fratris*."

A.—*Possessio fratris* is the seisin of the brother. Under this doctrine if a person becomes entitled to lands by purchase (in its technical sense), and has a brother of the half blood and a sister of the whole blood, the sister of the whole blood shall be his heir in preference to the brother of the half blood. But, otherwise, this doctrine is done away with by the 3 & 4 Will. 4, c. 106.

Q.—Can persons of the half blood inherit real estates by descent in any, and what, cases, and under what authority?

A.—A kinsman of the half blood is now capable of being heir, and such kinsman is to inherit next after a kinsman in the same degree of the whole blood, and after the issue of such kinsman when the common ancestor is a male, and next after the common ancestor when such ancestor is a female: (3 & 4 Will. 4, c. 106, s. 9; Will. Real Pro. 86,

4th edit.; 1 Hughes' Pract. Sales, 454, 455, 2nd edit.; 1 Steph. Com. 386.)

**Q.**—What are the general rules as to the descent of freehold lands of inheritance?

**A.**—As altered by the recent act, 3 & 4 Will. 4, c. 106, the rules of descent may be thus stated :—

1. In every case the descent shall be traced from the purchaser.
2. Inheritances shall in the first place lineally descend to the issue of the purchaser *in infinitum*.
3. Males are preferred to females, and an elder male to a younger ; but females (when there are several) take together.
4. The issue of the children of the purchaser represent or take the place of their parent *in infinitum* ; the children of the same parent being always subject (amongst each other) to the same law of inheritance as contained in the third rule.
5. On failure of the issue of the purchaser, the inheritance shall descend to the nearest lineal ancestor then living in the preferable line, supposing no issue of a nearer ancestor in that line to exist.
6. Among the lineal ancestors of the purchaser, the paternal line (whether of the purchaser or of any ancestor, male or female) is always preferred to the maternal.
7. Where an ancestor, to whom, if living at the purchaser's death, the inheritance would, according to the fifth rule have descended, dies before the purchaser, leaving issue, the issue of such ancestor *in infinitum* shall represent him, according to the same law of succession as before laid down with respect to the issue of the purchaser ; but with this addition, that those related by the whole blood to the purchaser are preferred to those related by the half blood : (1 Steph. Com. 373, *et seq.* 3rd edit.)

**Q.**—A man having had two sons, the elder of whom died before him, leaving two sons, dies intestate, seised in fee of gavel-kind lands, leaving issue the two grandsons (sons of his eldest son) and his second son. State the proper parties to convey to a purchaser.

**A.**—Both the son and grandsons must join in the conveyance. For by the custom of gavel-kind the lands descend, not to the eldest son or his issue, but to all the sons together : (Will. Real Pro. 105, 4th edit.)

**Q.**—A. dies, leaving two granddaughters, the issue of a deceased daughter ; a grandson, the issue of another deceased daughter ; and two daughters : to whom will his estates in fee simple descend ?

**A.**—The estates will descend to the whole of them as coparceners, and the two granddaughters and the grandson will respectively stand in the place of and take their deceased parents' shares : (Will. Real Pro. 81, 383, *et seq.* 4th edit. ; Sug. Real Pro. Stats. 282, 283 ; 1 Steph. Com. 320.)

**Q.**—A. dies without issue, leaving a father and brother of the half blood, and a sister of the whole blood ; upon whom would the estate have descended previous to the operation of the Inheritance Act, 3 & 4 Will. 4, c. 106, and upon whom would it descend subsequently to that period ?

**A.**—Prior to the above statute the estate would in such a case have descended to the sister of the whole blood in preference, not only to the brother of the half blood but also to the father ; for as to the latter,

inheritances were compared to a falling body, and, therefore, could never ascend. By this act, however, the father is capable of being heir to his son, and in the case put will inherit in preference to the sister of the whole blood or brother of the half blood : (1 Steph. Com. 376, 3rd edit. ; Will. Real Pro. 85, 4th edit.)

Q.—The owner in fee of freehold and copyhold estate dies intestate, and without an heir ; who becomes entitled to the estates, and by what means technically expressed ?

A.—The freehold estates will *escheat* (as it is called) to the lord of whom he held them. Bastardy is the most usual cause of the failure of heirs ; for a bastard is *nullius filius*, and can consequently have no brother or sister, or any heir except an heir of his body. The Crown most frequently obtains lands escheated, because the Crown was the original proprietor of all the lands in the kingdom. Copyhold estates also escheat to the lord of the manor on failure of heirs : (Will. Real Pro. 102, 303, 4th edit. ; 1 Steph. Com. 403, 405.)

Q.—If a person who is illegitimate dies intestate, leaving no legitimate issue, who becomes entitled to any real or personal estate of which he may die possessed ?

A.—Bastards are incapable of being heirs, being *nullius filii*, the sons of nobody. And as bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies, for as all collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred, and, consequently, can have no legal heirs but such as claim a lineal descent from himself. And, therefore, if a bastard purchases land, and dies seised thereof without issue, and intestate, the land shall escheat to the lord of the fee : (1 Steph. Com. 403, 405.) The Crown, for the reasons before stated, most frequently obtains lands escheated : (Will. Real Pro. 102, 4th edit.) The personal estate will, for the like reasons, be forfeited to the Crown ; and letters patent are procured from the Queen, and administration is granted to the appointee of the Crown : (2 Steph. Com. 241 ; Coote's Probate Ct. Pract. 94.)

Q.—A man seised in fee dies intestate, and without issue, leaving a widow, a father and a brother ; who becomes entitled to his estate, and by what law ?

A.—The father will become entitled to the estate (subject to the widow's right to dower, if not barred) by the statute 3 & 4 Will. 4, c. 106, s. 6 : (see Will. Real Pro. 85, 4th edit. ; 1 Steph. Com. 376 ; 1 Hughes' Pract. Sales, 449, 2nd edit.)

Q.—A. dies intestate, seised in fee simple, leaving one daughter (B.), a grandson by a deceased daughter (C.), a grandson and granddaughter by a deceased daughter (D.), a granddaughter by a deceased son (E.), and two granddaughters by a deceased daughter (F.) ; to whom will A.'s real estate descend ?

A.—The daughter of the deceased son (E.) will be entitled to the real estate of A. ; the rule being that the male issue and their descendants shall be admitted before the female : (Will. Real Pro. 80, 85, 4th edit. ; 1 Steph. Com. 373.)

Q.—A. dies seised of real estate without issue, and intestate, leaving

his grandfather, and his (A.'s) mother, and a brother and sister him surviving ; which of these is his heir ?

A.—His brother is his heir : (see Will. Real Pro. 86, 4th edit. ; 1 Steph. Com. 376, 378.)

Q.—A man dies unmarried, leaving his father and an elder brother him surviving ; which of these will be his heir-at-law ?

A.—The father will be the heir-at-law of his son : (Will. Real Pro. 85, 4th edit.)

## TRUSTEES, EXECUTORS, &c.

*Question.*—Can a trustee for sale become a purchaser ; in any, and what case ?

*Answer.*—A trustee cannot purchase of himself, and he is not allowed to become a purchaser of the trust property even at a sale by public auction. But, although a trustee cannot purchase of himself, he is allowed to purchase from his cestui que trust, provided there is a distinct and clear contract, ascertained to be such after a scrupulous and jealous examination of all the circumstances, and there is no fraud, no concealment, and no advantage taken by the trustee of information acquired by him in the character of trustee : (Story's Eq. Jur. §§ 321, 322 ; 1 Hughes' Pract. Sales Real Pro. 232, 233, 2nd edit.) When an estate is vested in trustees upon trust for sale, and the trustee is desirous of becoming a purchaser, the only safe course is to file a bill for the purpose of carrying the trusts into execution under the direction of the court, and upon the sale apply to the court for leave to become the purchaser upon offering to give more than any other person ; (1 Hughes' Pract. Sales Real Pro. 234, 2nd edit.)

Q.—When an estate is offered to a trustee at a price below its actual value, upon condition that the title should not be investigated, is the trustee justified, under the usual indemnity clause inserted in settlements, in purchasing the estate out of the trust funds, at the request of his *cestui que trust*, upon those terms ? And give a reason for your answer.

A.—There are certain things which either clearly appear in themselves to be duties, or are established as such by the uniform policy of courts of equity, and to these the courts require a rigid adherence. But in regard to other points the trustee is only required to use customary care and diligence. If a trustee invests money on unauthorized security, however unexceptionable it might seem to be, and such security afterwards fails, he will be liable ; and an indemnity clause, declaring that they shall not be liable for the insufficiency, will not exonerate them from liability : (Smith's Manual of Eq. Jur. 164, *et seq.* 4th edit.) A trustee who commits a breach of trust is not protected, although at the request of his *cestui que trust*. It is impossible to pronounce that a trustee, whatever precautions he may take, is safe from personal risk, unless he has acted in the execution of the trust under the directions of the Court of Chancery : (*id.* 181, 182 ; and see hereon 22 & 23 Vict. c. 35, ss. 30 to 32.)

Q.—What powers should be given to the trustees of a will of real



estate directing sales, and declaring trusts of the proceeds, that may last for many years?

A.—Power to sell by public auction or private contract, and either in lots, or entirely, with power to buy in and to rescind any contract for sale, and to resell, also power to lease. A clause making the receipts of the trustees sufficient discharge to persons paying money. Power to appoint new trustees; and an indemnity to trustees against losses which accrue without their neglect or default. Also, where the trustees have a discretion given them as to the time at which the sale shall be made, it should be provided by the will that the rents and profits of the real estate should, until sale, be applied as the income of the purchase moneys: (see Allnutt's Pract. Wills and Adms. 44, *et seq.* 3rd edit.; and see hereon 22 & 23 Vict. c. 35, ss. 14 to 18, 23.)

Q.—If a trustee of a term dies leaving an executor, who dies and leaves an executor, who is the representative of the trustee; and who if the executor die intestate?

A.—If a trustee of a term dies leaving an executor, and then the executor dies, also leaving an executor, the executor of the trustee's executor will be the trustee's representative; if the trustee's executor had died intestate, a representative must have been made by taking out administration *de bonis non* to the goods of the trustee: (see Matthews' Guide to Exors. 306, 2nd edit.; Allnutt's Pract. Wills and Adms. 192, 3rd edit.)

Q.—Can a trustee give a power of attorney to another person to act for him in the trust? And give a reason for your answer.

A.—A trustee can give a power of attorney to a third person to do such acts as bringing actions, or commencing suits, and the like, but not to give receipts, or similar powers: (see Sug. V. & P. Conc. View, 516 to 527; Smith's Man of. Eq. tit. 2, ch. 7; *Viney v. Chaplin*, 31 L. T. Rep. 142.) *If the trust be of a discretionary character, not only is the trustee answerable for all the mischievous consequences,*

Q.—A. purchases a freehold estate, B. and C., his wife's trustees, lending part of the money. It is desired to embrace in one deed the mortgage and conveyance. State shortly how the estate should be limited.

A.—The estate should be limited unto and to the use of B. and C. (the trustees), their heirs and assigns, by the direction of A.; with a proviso for redemption by A., and conveyance to him by B. and C. on payment of the sum lent, with interest in the mean time.

Q.—What covenants is it usual for trustees to enter into?

A.—Trustees merely covenant, <sup>affirmatively</sup> that they have done no act to incumber: (Will. Real Pro. 369, 4th edit.; Sug. V. & P. Conc. View, 463.)

Q.—Can one of several executors, or one of several administrators, assign leaseholds of his respective testator or intestate, or must they all concur? State any distinction, if it exists, and the reasons for it.

A.—An assignment of leaseholds by one of several executors who prove the will is good (see Allnutt's Pract. Wills and Adms. 275, 3rd edit.), they having a joint and several interest in their testator's personal estate. But, as to administrators, there is a conflict of decisions as to whether an assignment by one is good, it being said their authority was only joint, and not joint and several (see *Hudson v. Hudson*, 1 Atk. 460, against this authority, and *Jacomb v. Harewood*, 2 Yes. 265, for

it); but the case of *Jacomb v. Harewood* seems now to be recognised as law.: (see Burton's Comp. pl. 958.)

Q.—What is an executor *de son tort*; and in what cases is a discharge given by him available against a claim brought by the legal representative?

A.—An executor *de son tort* is one of his own wrong. Mere acts of kindness, as burying the dead, or feeding cattle, will not make a person executor *de son tort*; but if he intermeddle in that character, so as to exceed offices merely of kindness and charity, he will make himself answerable as if he were actual and lawful executor. His intermeddling renders him liable to others without arming him with any legal rights (see Matthews on Exors. & Adms. 96, 97, 2nd edit.), as giving discharges. But he is only chargeable with debts of the deceased so far as assets come to his hands: (see hereon 2 Steph. Com. 245.)

Q.—What was the position, legal and equitable, of an executor in respect of residue undisposed of by the will previously to the statute 11 Geo. 4 & 1 Will. 4, c. 40; and what alteration did the statute make?

A.—Before the statute 1 Will. 4, c. 40, where a testator made no express disposition of the residue of his personal estate, the executor was at law entitled to such residue; and courts of equity, as the act recites, so far followed the law as to hold such executor entitled to retain such residue for his own use, unless it appeared to have been the testator's intention to exclude him from it. In that case he was held to be a trustee for the next-of-kin. And equity would seize hold of any slight expressions of the testator to constitute the executor such a trustee: (see Story's Eq. Jur. § 1208, and note.) But by the above act the executors are in equity trustees for the next-of-kin (if any), unless the will shows a contrary intention: (Smith's Man. Eq. Jur. 135, 3rd edit.)

Q.—A. appoints B. his executor, B. dies intestate. How must a representative to A. be obtained?

A.—If A. appoints B. his executor, and B. dies intestate without having fully administered, a representative of A. must be obtained by taking out administration *de bonis non*; that is, administration to the goods of A., not already administered by B.: (see Allnutt's Pract. Wills & Adms. 192, 3rd edit.)

Q.—A. (a trustee of a real estate for B.) purchases the estate from B. soon after he attains twenty-one; can A. make such a title as a purchaser from him is bound to accept, and if the purchaser does accept the title, does he incur any, and what, liabilities to B.?

A.—If A. purchases from B. his *cestui que trust*, the sale may be avoided by B. without showing any fraud on A.'s part, for a trustee is not allowed by courts of equity to purchase the trust-estate, and his sub-purchaser, with notice of the trust, stands in no better position than the trustee. But if the *cestui que trust* were for a long time to acquiesce in the sale, he would not then be allowed to set aside the transaction, for equity discountenances laches: (see Story's Eq. Jur. § 322, &c.; Smith's Man. Eq. 70, 171, 3rd edit.)

## OUTSTANDING TERMS—MERGER.

*Question.*—What is an attendant term, and what was the advantage proposed by the assignment of it?

*Answer.*—A term was said to be attendant when vested in some trustee in trust for the owner of the inheritance out of which it had been raised. The advantage gained by an assignment of an outstanding term was this: if it afterwards turned out that prior to the purchase of the estate to which the term was attendant, but posterior to the creation of the term, there had been an intermediate alienation or incumbrance of the fee in favour of another person, to whom the then trustee of the outstanding term had been no party, and of which the subsequent purchaser had no notice when he took his conveyance and paid his purchase money, he would be protected against it through the medium of the term, which, being the elder title, would also take the priority in point of legal effect, and being assigned expressly in trust for him became for all beneficial purposes his property: (see further 1 Steph. Com. 364, 3rd edit.; Will. Real Pro. 338, *et seq.* 4th edit.)

*Q.*—Did the term ever, and when, become attendant upon the inheritance without an actual assignment to attend?

*A.*—If the term were neither surrendered nor assigned to a trustee to attend the inheritance, it was still considered attendant on the inheritance by construction of law, for the benefit of all persons interested in the inheritance according to their respective titles and estates: (Will. Real Pro. 346, 4th edit.)

*Q.*—Was there any, and what, advantage to a purchaser in taking an actual assignment of outstanding terms to trustees for the purchaser in trust to attend the inheritance over a general declaration, that all persons in whom outstanding terms were vested should stand possessed of them in trust for the purchaser?

*A.*—There was great advantage in taking an actual assignment of a term over a mere declaration of trust, as the latter would have afforded no protection whatever against a subsequent purchaser, without notice for valuable consideration, who had obtained an assignment of the term: (see 1 Hughes' Prac. Sales Real Pro. 558, 2nd edit.)

*Q.*—If an outstanding term had never been assigned to attend the inheritance, at whose expense was such assignment made?

*A.*—The practice was for the vendor to be at the expenses of deducing the title to the term, and the purchaser to defray the expenses of assignment: (2 Hughes' Pract. Sales Real Pro. 233, 2nd edit.)

*Q.*—A term of years is vested in B. in trust; he by his will, without reference to that trust, appoints C. and D. executors; D. renounces probate, and by deed disclaimed all trusts and interests in the will; C. alone proves the will, and dies, leaving D. surviving: how is the term to be assigned?

*A.*—D. cannot now as formerly retract his renunciation and assume the executorship, and so merge the term; but administration *de bonis non* must be taken out in order to merge it: (see Coote's Probate Ct. Pr. 50, 117, 172.)

**Q.**—What is meant by the merger of a term of years?

**A.**—Where a person is possessed of a term of years, and afterwards becomes possessed of the freehold, whether in fee, in tail, or for life, if no other estate intervene, the term will become swallowed up in the freehold or (as it is technically termed) *merged* in it (Will. Real Pro. 340, 341, 4th edit. *et ante*, p. 116) (*a*).

**Q.**—An estate is granted to A. for 1,000 years, subject thereto to B. for life, remainder to C. in tail, with reversion to D. in fee. To whom should the term be surrendered for the purpose of merging it?

**A.**—The term must be surrendered to B. the tenant for life, his being the next succeeding estate of freehold: (see Will. Real Pro. 340, 341, 4th edit.; Burton's Comp. pl. 896, *et seq.*)

**Q.**—Under what circumstances will a term of years merge in the freehold or inheritance? Mention one or two.

**A.**—When they both coincide in the same person in the same right without any intermediate estate, as, if A. is possessed of a term of years, and he afterwards acquire the freehold, either by descent or by purchase, the term will merge in the freehold: (1 Steph. Com. 303, 304, 3rd edit. and see *supra*.)

**Q.**—If a tenant for years dies, having appointed the person who is seised of the immediate freehold to be his executor, will the term merge or not? Give a reason for your answer.

**A.**—The term will not merge, for the executor is recognised by the law as usually holding only for the benefit of creditors and legatees, that is, *en autre droit*: (1 Steph. Com. 303, 304, 3rd edit. *et supra*.)

**Q.**—Where terms of years are created by settlement, what are the events usually expressed in the proviso for cesser of such terms?

**A.**—By inserting in the deed by which the term is created a proviso that it shall cease, not only at its expiration by lapse of time, but also in the event of the purposes for which it is created being fully performed and satisfied, or becoming unnecessary, or incapable of taking effect: (Will. Real Pro. 340, 4th edit.)

**Q.**—What is the present law as to satisfied terms; and what do you consider the proper practice as to assigning them or not, and why?

**A.**—By the stat. 8 & 9 Vict. c. 112, all satisfied terms were to cease on the 31st Dec. 1845; but still to continue the same protection as before against incumbrancers in those cases where they have been made attendant by express declaration (ss. 1, 2; 2 Hughes' Pract. Sales Real Pro. 111, 2nd edit. But even this is a limited protection, for it gives not such protection as a further assignment of a term for a purchaser would confer, but such protection as it would have afforded if it had continued to subsist, but had not been assigned or dealt with after the 31st Dec. 1845: (Sug. Real Pro. Stats. 288.) This puts an end to the assignment of satisfied terms as a protection to a purchaser who became such after this act; and there appears to be no foundation for the notion that any such term can now be kept on foot as an attendant term by assignment: (Sug. V. & P. Conc. View, 373, 483.)

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(a) This question requires the same answer: A person in whom a term of years is vested, assigns it to the tenant for life, what is the effect on the term?

## BONDS.

*Question.*—In preparing a bond *from two* persons, what should be attended to in the form of it to make it effectual against both or either ; and, supposing one of the obligors to be merely a guarantee for the other, what should such guarantee require for his security from his co-obligor ?

*Answer.*—In the first case the bond should be made joint and several ; and, in the second, the guarantee should require from his co-obligor a counter bond (Will. Per. Pro. 324), or warrant of attorney.

*Q.*—Suppose there are two partners, and they give their joint bond for payment of money to W., and one of such partners dies ; what extent of remedy has the obligee against the surviving partners, and against the representative of the deceased partner ?

*A.*—At law only the surviving partner can be sued ; in equity the representatives of the deceased partner may be sued also : (see Will. Per. Pro. 241, 2nd edit.)

*Q.*—A. and B., not partners, are to give their bond to C. for the payment of a certain sum of money ; how is the obligation to be made, so that in case B. should die and leave A. surviving, C. may have a legal claim upon B.'s representatives ?

*A.*—Make the bond joint and several.

### III.—EQUITY.

#### GENERAL NATURE AND OBJECTS OF EQUITY JURISPRUDENCE.

*Question.*—How may “Equity” be defined ?

*Answer.*—Equity may be defined to be a portion of justice, or natural equity, not embodied in legislative enactments or in the rules of the common law, yet modified with<sup>the</sup> a due regard thereto, and administered where the courts of law cannot, or originally did not, clearly afford any relief, or adequate relief, at least not without circuity of action or multiplicity of suits, or where they cannot direct such restrictions, adjustments, compensations, or conditions as may be necessary in order to take a due care of the rights of all who are interested in the property in litigation : (see Smith’s Man. Eq. Jur. 1 to 10, 4th edit. ; 1 Steph Com. 80, *et seq.* 3rd edit. ; Hallilay’s Articled Clerk’s Handbook, 32.)

*Q.*—Explain the origin of equity ?

*A.*—The origin of equity is involved in some obscurity, and there are conflicting opinions upon the subject : (see Story’s Eq. Jur. ch. 2.) But there seems little doubt that the Court of Chancery was called into existence to supply the defects of the common law, and to give relief where it did not or could not ; the application for relief being made to the King himself, and now to the Lord Chancellor, as keeper of the King’s (or Queen’s) conscience : (see 1 Steph. Com. § 80, *et seq.* 3rd edit. ; Hallilay’s Articled Clerk’s Handbook, 32, 33.)

*Q.*—State the distinction between law and equity ?

*A.*—It principally consists in the difference of the subjects over which they exercise jurisdiction, in the kind of relief they administer, and their mode of proceeding : (4 Steph. Com. 9.) For, as to the first distinction, courts of law adjudicate *in rem* upon titles completed by actual conveyance, and rule accordingly ; but courts of equity adjudicate *in personam* upon the conscientious obligations of parties and their contracts, and compel a performance in specie. As to the second, courts of equity decree the specific performance of mere executory contracts, &c. ; but law, even at the present day (see *Benson v. Paull*, 27 L. T. Rep. 78), will only award damages for the non-performance : (see Hallilay’s Articled Clerk’s Handbook, 33, *et seq.*) As to the third distinction, they differ in their mode of proof and trial of causes ; in equity evidence is mostly taken upon affidavit, and comes before the judge in that state, who decides the case upon the facts as thus presented before

him, while at law evidence is adduced orally before the judge and a jury at the trial, and the jury thereupon decide as to the facts, under the judge's direction to a certain extent.

**Q.**—Is there any, and what, difference between the general principles by which a court of equity is guided, and those of a court of law?

**A.**—It is a popular mistake that an equity judge decides according to an unbounded discretion, without any regard to strict rules. But there are certain principles upon which courts of equity act, which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of law. They decide new cases as they arise by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of those principles, but the principles are as fixed and certain as the principles on which the courts of common law proceed: (Story's Eq. Jur. §§ 18, 19, 20; 4 Steph. Com. p. 4.)

**Q.**—Before the jurisdiction of the court was settled, what were the limits placed to its power? Mention some of the cases from the Year Books in which its interposition was applied for, by way of illustration.

**A.**—Before the jurisdiction of the court was settled, its limits in administering relief were almost according to the conscience of the Chancellor, as was remarked by Selden. The cases that occurred at this time were for assaults and trespasses, and a variety of outrages, which were cognisable at common law, but for which the party complaining was unable to obtain redress in consequence of the maintenance and protection afforded to his adversary by some powerful baron or by the sheriff, or by some officer of the county in which they occurred. The relief was prayed by petition to the court: (see Story's Eq. Jur. chs. 1, 2, and the works there referred to.)

**Q.**—Could a judgment obtained by fraud at common law be then set aside in equity? How was this settled in 1616, and by whom, and on what occasion?

**A.**—Before 1616 it was considered that a judgment obtained by fraud at common law could not be set aside in equity. The point was mooted in the time of Sir Thomas More; and the controversy was renewed with great heat and violence in the reign of King James I., when there ensued the memorable conflict between Lord Coke, C.J., who was against the interference of Chancery, and Lord Ellesmere, who, as Chancellor, was for it. At last the matter came directly before the King, and, under the advice of his lawyers, he gave judgment in favour of the equitable jurisdiction in such cases: (see Story's Eq. Jur. § 51; 3 Steph. Com. 406, 3rd edit.)

**Q.**—Who were the distinguished chancellors who subsequently reduced the system into order, and to whom above all is the greatest share of merit ascribed in this respect?

**A.**—The distinguished chancellors who subsequently reduced the system into order were: Lord Bacon, who succeeded Lord Ellesmere, and who, by his celebrated ordinances for the regulation of Chancery, gave a systematical character to the business of the court. From this period down to the time of Sir H. Finch (afterwards Earl of Nottingham), little improvement was made either in the principles or practice of Chancery. With Lord Nottingham, however, a new era commenced.

In the course of nine years, during which he presided in the court, he built up a system of jurisprudence and jurisdiction upon wide and rational foundations, which served as a model for succeeding judges, and gave a new character to the court; hence he has been styled "the father of equity." Lord Hardwicke was the next chancellor, who completed the structure begun and planned by Lord Nottingham: (see Story's Eq. Jur. §§ 51, 52; 3 Steph. Com. 408, 3rd edit.)

A.—The modern system of equity established—state in what respect the maxim "*Æquitas sequitur legem*" is the rule, with any, and what, exception.

Q.—The true meaning of the maxim that "equity follows the law" is, that equity is governed by legislative enactments and the rules of law in regard to legal estates, rights and interests; and that it is regulated by the analogy of such legal estates, rights and interests, and the legislative enactments and rules of law affecting the same, in regard to equitable estates, rights and interests, where any such analogy plainly subsists, if in each case there are no peculiar circumstances rendering it absolutely necessary to deviate from this rule, or creating an equitable obligation in one of the litigant parties, and an equitable correlative right in favour of another litigant party, and requiring a different course to be taken in the particular case, without overturning or destroying the general application of any legislative enactments or rules of law that may, in terms or by analogy, apply to the case: (see further Smith's Man. of Eq. tit. "General Maxims.")

Q.—What is the rule of interpreting the statute law in equity? and does it differ from that of the common law? (a)

A.—Both courts of law and courts of equity are equally bound and equally profess to interpret statutes according to the true intent of the Legislature. In general law all cases cannot be foreseen; or, if foreseen, cannot be expressed. Some will arise that will fall within the meaning, though not within the words, of the legislator; and others, which may fall within the letter, may be contrary to his meaning, though not expressly excepted. In reference to this, a case is sometimes said to fall within the equity, or, at others, to be out of the equity, of an act of Parliament. But here, by equity is meant nothing but the sound interpretation of the law; though the words of the law itself may be too general, too special, or otherwise inaccurate or defective. But there is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges in the courts both of law and equity; the construction must in both be the same, or, if they differ, it is only as one court of law may happen to differ from another. Each endeavours to fix and adopt the true sense of the law in question; neither can enlarge, diminish, or alter that sense in a single title: (4 Steph. Com. 3; Story's Eq. Jur. § 15.)

Q.—What are the peculiar objects of jurisdiction of courts of equity? Give, *exempli gratia*, instances under each head.

A.—The peculiar objects of jurisdiction of the courts of equity are said to be the following: *accident*, as where public stock directed by will to be set apart to answer an annuity is reduced by act of Parlia-

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(a) Also put in this form: With what latitude does equity construe statute law?



ment, equity will interfere by decreeing the deficiency to be made up against the residuary legatees on the ground of accident; *fraud*, which not only includes actual deceit, but also all acts, omissions and concealments which involve a breach of legal or equitable duty, or confidence justly reposed; and *trusts*, as where a use is engrafted on a use, which of course the Statute of Uses cannot operate upon, equity will enforce the trust in favour of the *cestui que use*: (see 4 Steph. Com. 3; Smith's Manual of Eq.)

Q.—What are the three principal cases in which the Court of Chancery grants relief, as stated by Lord Coke?

A.—They are, fraud, accident and trusts: (see 4 Inst. 84.)

Q.—Is there any, and what, difference in the consideration of *choses in action* in courts of law and equity?

A.—It is a rule of the common law, that no possibility, right, title, or *chose in action* can be granted to third persons, (except in the case of the king, to whom, and by whom, an assignment could always be made), for it was thought a different rule would be the means of multiplying contentions and suits. And at law, except in the case of negotiable instruments and some few other securities, this rule still continues, unless the debtor assents to the transfer, so as to enable the assignee to maintain a direct action against him, on the implied promise resulting from such assent. Courts of equity, however, give effect to assignments for valuable consideration of *choses in action*. For such assignments of a *chose in action* are considered, in equity, as amounting to an agreement to permit the assignee to make use of the name of the assignor at law, in order to recover the debt, or reduce the property into possession; or as a contract entitling the assignee to sue in equity in his own name, and enforce payment of the debt directly against the debtor, whether he has assented or not, making him as well as the assignor, if necessary, a party to the bill: (see Story's Eq. Jur. §§ 1039, 1040 c, 1044, 1055, 1057; Smith's Man. 200, &c. 5th edit. ante, p. 137.)

Q.—Mention some of the principal heads of equitable jurisdiction.

A.—The following are some of the principal heads of equitable jurisdiction: accident, mistake, fraud, trusts, administration, specific performance of agreements, injunctions, election and discovery: (see Story's Eq. Jur.; Smith's Man. Eq. 5th edit.)

Q.—In what cases has equity jurisdiction exclusive of the common law?

A.—The C. L. P. Act of 1854 has very much narrowed the exclusive jurisdiction of the court of equity. But the Court of Chancery still retains exclusive jurisdiction over accident and mistake, uses and trusts, granting specific performance in matters of contract not comprising a public duty (see hereon *Benson v. Paull*, 27 L. T. Rep. 78); perpetuating testimony where there is no actual litigation; granting the mortgagee's right of foreclosure, or enforcing a mortgagor's right of redemption where the right is gone at law; by bills of peace to establish and perpetuate in favour of, or against, a number of persons, some general or private right, which, from its nature, is likely to be established or overthrown by different persons at different times; also, in the guardianship of infants, idiots, lunatics, married women, and other persons, under disabilities: (see Halliday's Articled Clerk's Handbook, 33.)

Q.—In what cases has it concurrent jurisdiction?

A.—Courts of equity and common law have concurrent jurisdiction in compelling the specific performance of contracts comprising a public duty ; in enforcing the delivery up of specific chattels ; in granting injunctions ; and in compelling a discovery. Courts of common law may also entertain equitable defences : (see *ib.*)

Q.—In what cases has it auxiliary jurisdiction ? (a) *that none now*

A.—A Court of Chancery cannot now be said to have auxiliary jurisdiction to a court of common law in any case, for both courts may compel a discovery : (see *ib.*)  
*he has no jurisdiction - see H. Chancery*

Q.—In what cases have courts of equity no jurisdiction, or decline to exercise it ?

A.—Where it is clear that courts of law did always afford adequate and complete relief without the aid of a court of equity, and without circuity of action and multiplicity of suits, and could take due care of the rights of all persons interested in the property in litigation, courts of equity have no jurisdiction : (Smith's Man. Eq. Jur. 12, 4th edit.) Courts of equity decline to exercise their jurisdiction in cases where one party has no more equity than another (Story's Eq. Jur. § 64 c), or where both parties are *in pari delicto*, unless public policy would be promoted by such interference (*id.* §§ 298, 303, 304), or where, under the circumstances, complete justice would not be done : (*id.* § 895, *et seq.*)

Q.—State some of the maxims or rules which govern or indicate the principle of equity jurisprudence.

A.—Amongst the maxims of equity jurisprudence may be ranked the following : Equity will not suffer a right to be without a remedy. Equity follows the law. Equity delighteth in equality. It is a maxim that, *vigilantibus, non dormientibus, equitas subvenit* : the meaning of which is, that equity discountenances laches. Where there is equal equity the law prevails. He who seeks equity must do equity. Equity looks upon that as done which ought to be done : (see Story's Eq. Jur. § 63, *et seq.* ; Smith's Man. Eq. Jur. 10, *et seq.* 5th edit.)

Q.—Selden hath said, "For law we have a measure and know what to trust to. Equity is according to the conscience of him that is Chancellor, and, as that is larger or narrower, so is equity." Is this an accurate description of equity as administered in our courts ? State the grounds of your opinion.

A.—The opinion of Selden is not an accurate description of equity as administered in our courts at the present time, whatever it may have been formerly, for, as before seen, there are certain principles on which courts of equity act, which are very well settled. The cases which occur are various ; but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of law : (see further *supra.*)

Q.—Will a party, who has attested the execution of a deed, be held by a court of equity from that circumstance to be affected with notice of the contents of such deed ?

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(a) This and the two preceding questions have also been asked to this effect : Q. Mention, first, what matters are not comprised within the scope of the common law ; and, secondly, the kinds lately coming before the courts of the latter.

*A.*—The better opinion is that, being a witness to the execution of a deed will not of itself be notice; for a witness, in practice, is not privy to the contents of the deed: (see Sug. V. & P. Conc. View, 614, and the cases there cited.)

*Q.*—State some cases in which a party, not having actual notice, will be held to have constructive notice, so as to affect him in a court of equity the same as if he had received actual notice.

*A.*—It has been a long-established rule in equity that notice to the agent is notice to the principal, since it would be a breach of trust in the former not to communicate the knowledge to the latter. It is also a rule, that whatever is sufficient to put a party upon inquiry (that is, whatever has a reasonable certainty as to time, place, circumstances and persons), is, in equity, held to be good notice to bind him. Thus, notice of a lease will be notice of its contents. So, notice of a deed which recites another deed, will be constructive notice of the latter deed. But vague and indefinite rumour or suspicion is too loose to be admitted in practice as sufficient. But there will be found infinite grades of presumption between such rumour, or suspicion, and that certainty as to facts, which no mind could hesitate to pronounce enough to call for further inquiry, and put a party upon his diligence: (see Story's Eq. Jur. §§ 399, 400, 400 a, 408; 2 Hughes' Pract. Sales, 114, *et seq.* 2nd edit.)

*Q.*—Define the principles which guide the courts of equity in the construction of wills?

*A.*—In deciding on the validity and interpretation of purely personal bequests, courts of equity implicitly follow the rules of the civil law as formerly recognised in the ecclesiastical courts, and now in the Probate Court, but, as to the validity of devises and legacies charged on land, they generally follow the rules of the common law: (see Story's Eq. Jur. §§ 602, 608; Smith's Man. Eq. Jur. 94, 95, 5th edit.) And all courts, as far as possible, in the construction of wills, are guided by, and try to carry out, the intention of the testator: (see *ante*, p. 170.)

*Q.*—When there are two clauses absolutely inconsistent with each other, which clause prevails, the first or the last; and is this rule the same in both deeds and wills, and, if different, in what particular?

*A.*—As a general rule, in a deed where there are two clauses or limitations inconsistent or repugnant with each other, the former clause is allowed to prevail, though its effect would be to annihilate the latter one altogether; as if a grant were to be made to A. and his heirs in the premises, and by the *habendum* the limitation was to be restrained to his life, the *habendum* would be rejected as repugnant to the estate of inheritance conferred on him by the premises, which a subsequent clause would not be permitted to divest. But the *habendum* may *explain* what particular kind of heirs were intended, without being considered repugnant to the grant: (1 Hughes' Pract. Sales, 295, 2nd edit.; and see Burton's Com. pl. 512, 601.) In the case of wills, where two parts are repugnant, so that they cannot both take effect, the general rule is that the latter clause shall prevail, as implying a change in the testator's mind: (Burton's Com. pl. 601, 602; 1 Hughes' Pract. Sales, 297, 2nd edit.)

*Q.*—Will a court of equity interpose where one party has no more equity than another, or will it leave the parties to their remedy at law?

*A.*—It is a maxim, that where the equities are equal, the law prevails.

They will, therefore, be left to their remedy at law : (Story's Eq. Jur. § 64 c. ; Smith's Man. Eq. Jur. 19, 5th edit.)

Q.—In what cases is it necessary to resort to a court of equity, in support of a right which can be established only through a court of law ?

A.—If any discovery was necessary before the right could be established at law, the party seeking it would formerly have been compelled to have had recourse to a court of equity ; but now the Common Law Procedure Act 1854 (17 & 18 Vict. c. 125), has given to the courts of common law a power of compelling discovery on the application of either party, either of documents in their possession or power relating to the matter in dispute, or of facts in their knowledge, leave being first obtained : (ss. 50, 51, and *ante*, pp. 68, 226.)

Q.—Are there any cases in which a remedy is afforded both at law and in equity ? If so, enumerate some of them. State any instance in which, on account of the more efficient nature of the equitable remedy, the common law proceeding has fallen into disuse.

A.—As already seen (*ante*, p. 226), courts of common law are provided in certain cases with remedies which could formerly only be exercised by a Court of Chancery : as power to grant injunctions, to compel discovery, and also for the specific delivery up of chattels : (17 & 18 Vict. c. 125.) In cases of administration account, &c. a remedy might have been had both at law and in equity. But the old action of account has fallen into almost entire disuse, in consequence of its inconvenience and inadequacy as a remedy : (Story's Eq. Jur. § 442 ; Smith's Man. Eq. Jur. 184, 219, 5th edit.)

Q.—State some of the cases in which a court of equity will set aside a deed or contract.

A.—Equity will set aside deeds or contracts where they are fraudulently obtained, as where they are obtained from idiots or lunatics, or from persons excessively drunk or under extreme terror, &c., or where the transaction is usurious : (Story's Eq. Jur. § 230, 301 ; Smith's Man. Eq. 58, 324, &c. 5th edit.)

Q.—What is a meritorious consideration, and will it support a contract in equity ?

A.—A meritorious consideration is one which does not consist of money payment, but arises from natural love and affection ; as for an *already* taken wife. It is now settled that a contract founded on merely a meritorious consideration will not support a contract in equity : (Story's Eq. Jur. § 393 b ; 27 L. T. 124 ; Smith's Man. Eq. Jur. 192, 5th edit.)

Q.—State some cases in which courts of equity will support a voluntary conveyance ; and in what cases the court will set such a conveyance aside, and when will the court refuse to interfere.

A.—If the conveyance is complete, so that no act remains to be done to give full effect to the title, equity will enforce it against the party making or creating it, and his representatives, although it be merely voluntary : (Smith's Man. Eq. Jur. 192, 5th edit.) But the court will set such a conveyance aside in favour of a *bonâ fide* purchaser for valuable consideration, or in favour of the creditors of the party, if he was indebted at the time : (see Sug. V. & P. Conc. View, 565 ; Smith, *ubi*

*sup.*) If there are two voluntary conveyances, and each is *bonâ fide*, equity will not interfere : (Story's Eq. Jur. § 433 ; Smith, *ubi sup.*)

**Q.**—A. gives a bond to B. to secure payment of a debt, the bond is lost ; has B. any, and what, means to compel the payment of it ?

**A.**—A person may come into a court of equity for the payment of a lost bond ; because, until a recent period, no relief was given at law on account of the want of a profert. And it is often proper to grant relief upon the terms of the party giving a bond of indemnity, and a court of law cannot insist on such a bond as part of the judgment : (Story's Eq. Jur. §§ 81, 82 ; Smith's Man. Eq. Jur. 37, 5th edit.)

**Q.**—In what cases can a bill be filed for the delivery up of specific chattels to the owners ?

**A.**—The court will not, ordinarily, entertain bills for the specific delivery up of chattels. But where the chattel is of such a nature that the loss could not be fully compensated for by damages, the court will decree a specific delivery thereof ; as where the chattel is a family relic or heirloom, such as ancient gems, medals, or coins : (Story's Eq. Jur. §§ 708, 709 ; Smith's Man. Eq. Jur. 353, 5th edit.)

**Q.**—How many years' arrears of annuity can an annuitant recover according as the annuity may be secured by charge only on real estate, or by the limitation of an estate for a term of years to a trustee for securing the annuity, or by covenant only ?

**A.**—If the annuity is charged on real estate, only six years' arrears can be recovered, although the time within which the claim to the annuity itself may be preferred is twenty years. Annuities charged on land are governed by the statute 3 & 4 Will. 4, c. 27 : (see Browell's Real Pro. Stats. 61, 62, n.) If an annuity is secured by a covenant, then, as against the *covenantor*, twenty years' arrears may be recovered ; these cases being governed by the statute 3 & 4 Will. 4, c. 42 : (see sect. 3, Browell, *supra*.)

**Q.**—State the different disabilities by which a person may be hindered from suing in courts of equity, and the distinguishing characters of these disabilities.

**A.**—The following persons cannot institute a suit in their own names: an infant, or married woman, idiots and lunatics. This is done, in the first instance, for their protection ; for, as to infants, and lunatics and idiots, they are generally treated as having no capacity to bind themselves, from the want of sufficient reason and discernment of understanding ; and as to married women, they are considered, for most part, as merged in the husband, and, in the next place, to prevent injustice, for, as a suit cannot be instituted against them, it would be unjust to allow them to institute suits against others, when they are not liable for their own acts, for the remedy ought to be mutual. So, if full relief could always be had at law, equity has no jurisdiction ; or if both parties are *in pari delicto*, it will not interfere.

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## ACCIDENT AND MISTAKE.

*Question.*—Will a court of equity relieve against the defective execution of a power, and on what general principles?

*Answer.*—In the absence of any countervailing equity, relief will be granted by a court of equity in the case of a defective execution of a mere power, where the defect is not of the very essence of the power, and the defective execution is in favour of a charity, or of purchasers, creditors, or a wife, or a child; and the defective execution was occasioned by accident: (see Story's Eq. Jur. § 94, *et seq.*; Smith's Man. Eq. Jur. 38, 39, 5th edit.)

*Q.*—Will equity relieve against acts performed under mistaken notions of law?

*A.*—In regard to mistakes in matters of law, it is a maxim that *ignorantia legis non excusat*: (Story's Eq. Jur. § 111.) But when the mistake is one of title, arising from ignorance of a principle of law, of such constant occurrence as to be understood by the community at large, this is considered sufficient to give rise to a presumption that there has been some undue influence, misrepresentation, imposition, mental incompetency, or surprise, and so to entitle the party to relief: (Story's Eq. Jur. § 121, *et seq.*; Smith's Man. Eq. 41, 5th edit.)

*Q.*—Will equity relieve against mistaken information of facts?

*A.*—In regard to mistakes in matters of fact, relief will be granted on the presumption of any of the above circumstances where the mistake is unilateral, and the fact was material to the act or contract, and was not doubtful from its own nature, and was a fact which would not be ascertained by such diligence or care as is usual in transactions of the like nature, and of which the party was under a legal obligation to inform the mistaken person: (Story's Eq. Jur. § 140, *et seq.*; Smith's Man. Eq. 41, 5th edit.)

*Q.*—If, in a will or settlement, the usual power to appoint new trustees has been omitted, will a court of equity remedy the inconvenience; and, if so, in what way?

*A.*—Yes; the court will appoint new trustees: (see Story's Eq. Jur. tit. "Mistake," §§ 1060, 1282.) And by the 13 & 14 Vict. c. 50, s. 32, it is enacted, that whenever it shall be expedient to appoint a new trustee or trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees. The application under this act may be made by petition. And see 1st Order, April 22, 1850.

*Q.*—If an estate be sold for a certain sum of money and an annuity for the life of the vendor, and the vendor dies before the receipt of any of the annuity, will equity grant his representatives any relief?

*A.*—No; equity will not grant any relief to the vendor's representatives: (Story's Eq. Jur. § 104; Smith's Man. Eq. 33, 5th edit.)

## FRAUD.

*Question.*—What will amount to fraud in a purchaser in not apprising the vendor of any advantage of which the latter is ignorant?

*Answer.*—A purchaser is not bound to communicate his knowledge of the value of the property to the vendor; for it is the business of the vendor to know the value of his own property. Nor is mere inadequacy of price, or any other inequality in the bargain, sufficient to avoid it. Still, however, there may be such an unconscionableness or inadequacy in the bargain as to shock the conscience, and amount to conclusive evidence of imposition, &c.; and in such a case courts of equity ought to interfere on the ground of fraud. And where there are other ingredients of a suspicious nature, gross inadequacy must furnish the most vehement presumption of fraud. But if a purchaser is under a legal or equitable (not moral) obligation to communicate to a vendor an advantage of which the latter is ignorant, and he does not, this amounts to fraud, and for which equity will grant relief: (see Story's Eq. Jur. §§ 205, 207, 244, 246, 251; Lord St. Leonards' Handy Book, 27, 6th edit.)

*Q.*—What relief will a court of equity give in case of a contract obtained by fraud?

*A.*—When a contract has been obtained by fraud, specific performance will not be enforced. And the party injured may, unless the contract be clearly illegal on the face of it, file a bill to have it delivered up to be cancelled: (Story's Eq. Jur. §§ 439, 694, *et seq.*; Smith's Man. Eq. 58, *et seq.* 5th edit.)

*Q.*—If A. obtains the conveyance of an estate from B. by fraud, and A. sells the estate to a purchaser, will equity relieve B. and set aside such conveyance, and annul the sale to the purchaser? State in what case the court would, or would not, do so.

*A.*—Equity will give B. priority over the purchaser, if the purchaser had notice, actual or constructive, of the fraud (Story's Eq. Jur. §§ 409, 410); unless, indeed, B. also knew of the transaction between A. and the purchaser, and permitted it to be completed: (*id.* § 385; Smith's Man. Eq. 75, &c. 5th edit.)

*Q.*—When is a conveyance of property deemed fraudulent as against creditors or purchasers; and what is the effect of such a conveyance as respects the party making it?

*A.*—All voluntary conveyances are declared void as against *bonâ fide* purchasers for valuable consideration, and also against then creditors: (13 Eliz. c. 5; 27 Eliz. c. 4; 1 Hughes' Pract. Sales Real Pro. 223, *et seq.* 2nd edit.) The party making a voluntary conveyance does not by so doing prevent himself from disposing of the property to a *bonâ fide* purchaser: (Story's Eq. Jur. § 425, &c.; Smith's Man. Eq. 83, 84, 192, 3rd edit.)

*Q.*—Is or is not inadequacy of price, or inequality of bargain, a sufficient ground of itself for avoiding a contract in equity?

*A.*—Mere inadequacy of price, or other inequality of bargain, is not of itself sufficient to avoid a contract in equity, except in the case of

expectant heirs. &c. : (Story's Eq. Jur. §§ 244, 246, 339, *et seq.* ; Smith's Man. Eq. 71, 72, 5th edit.) (a)

Q.—What does the court of equity usually require to establish the validity of a purchase from an expectant heir ?

A.—Either a fair consideration to be paid or that the bargain be made known to and approved by the person to whose estate the expectant hopes to succeed. And it seems that in the latter case such person should be in a position to be able to relieve the expectant from his difficulties, in order to give the bargain validity : (see Smith's Man. Eq. 71 to 73, 5th edit.)

Q.—Are there any, and what, cases of fraud against which equity will not relieve ?

A.—Relief will not be granted when both parties are truly *in pari delicto* ; for the maxim is, that *in pari delicto potior est conditio defendentis et possidentis* : (Story's Eq. Jur. § 298.) An exception occurs, however, where public policy would thereby be promoted ; as in the case of a gaming security, which is void, and money paid on it may be recovered back : (*ib.* §§ 303, 304, 298 ; Smith's Man. Eq. 325, 5th edit.) So, relief will not be granted if the parties cannot be placed *in statu quo* : (*ib.*)

Q.—What is the rule in equity as to time, barring, or not barring, relief against fraud ?

A.—The 26th section of the 3 & 4 Will. 4, c. 27, enacts that in every case of *concealed fraud*, the right of any person to bring a suit in equity for the recovery of land or rent will be deemed to have first accrued at, and not before, the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered. But if the lands have got into the hands of a *bonâ fide* purchaser for valuable consideration, without notice of the fraud, no suit will lie for their recovery against the purchaser : (sect. 26 ; Sug. Real Pro. Stats. 102.) Therefore, in cases of concealed fraud, time is no bar, in equity, until the fraud is discovered : (see Browell's Real Pro Stats. 45.)

Q.—Will a court of equity recognise any period of time as a limitation to a suit against a trustee who is charged with fraud in the execution of his trust ?

A.—A *cestui que trust* is not barred from his claim for a breach of trust by any period of time, so long as the relation of trustee and *cestui que trust*, under an express trust, is acknowledged to exist : (Story's Eq. Jur. § 1520 ; Smith's Man. Eq. 123, 5th edit. ; Browell's Real Pro. Stats. 44.) But if he has acquiesced for a long time in the misconduct of his trustee, with a full knowledge of it, a court of equity will not relieve him : (Story's Eq. Jur. § 1284 a. ; Smith's Man. Eq. 124, 5th edit.)

Q.—Does the court impose any, and what, terms upon a plaintiff seeking to set aside a usurious contract ?

A.—In cases of usury, if the borrower comes into a court of equity seeking relief against the contract, the court will interfere only on the terms that the borrower will do equity by paying the lender what is

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(a) But although this is the case, yet equity will not, generally, enforce an agreement where the price is not fair and adequate : (see *Falcke v. Gray*, 33 L. T. Rep. 297 ; and see hereon *Law Times*, Vol. 33, No. 852, p. 243 to 245.)



really due to him, deducting the usurious interest : (Story's Eq. Jur. § 301; Smith's Man. Eq. 22, 325, 5th edit.)

*Q.*—In construction of the Registry Acts, whereby a registered deed takes priority of one unregistered, what relief will a court of equity afford, if the party knew of the unregistered deed ?

*A.*—In such case, the title of the party registering, with notice of the prior unregistered deed, will be postponed, and made subservient to the title of the party whose deed is not registered. For the object of the Registry Acts is only to secure subsequent purchasers and mortgagees against prior *secret* conveyances and incumbrances : (see Story's Eq. Jur. § 397; Sug. V. & P. Conc. View, 578; Smith's Man. Eq. 81, 5th edit.)

*Q.*—State what contracts and conditions in restraint of trade are void, and in what cases such contracts and conditions may be enforced.

*A.*—All contracts and conditions in *general* restraint of trade are void, as tending to discourage industry, enterprise and just competition. But a person may be restrained from carrying on a trade in a particular place, or with particular persons, or for a reasonably limited time. And a person may lawfully sell a secret in his trade or business, and restrict himself from using the secret : (Story's Eq. Jur. § 292; Smith's Man. Eq. 63, 5th edit.)

## TRUSTS AND TRUSTEES.

*Question.*—Define a trust.

*Answer.*—A trust, when used in the sense of an interest, is the equitable or beneficial interest or ownership of or in real or personal estate, existing apart from, and collateral to, the legal interest or ownership : (see Smith's Man. Eq. Jur. 96, 5th edit.; *ante*, p. 131.)

*Q.*—State the different kinds of trusts recognised in our courts of equity; and in what respect the legal differs from the equitable interest in the subject-matter of the trust.

*A.*—Trusts are either express, implied, or constructive. The person who has the legal interest in the subject-matter of the trust holds the direct and absolute dominion over the property in the view of the law; whilst he who has the equitable interest (called the *cestui que trust*) is entitled to the income and profits, or beneficial interest in the property : (Story's Eq. Jur. § 964; Smith's Man. Eq. 99, 5th edit.)

*Q.*—Define trusts executed and trusts executory; and state if there is any, and what, difference in their construction.

*A.*—Trusts executed are those which are formally and finally declared by the instrument creating them. A trust executory is a trust raised by a stipulation or direction to make a settlement or assurance to uses, or upon trusts, which do not appear to be formally and finally declared by the instrument creating such stipulation or direction : (Smith's Man. Eq. Jur. 100, 2nd edit.) Trusts executed are construed in the same manner as similar limitations of legal estates and interests would be construed in courts of law; so that, for example, what would create an estate tail in one case will create one in the other. But trusts executory are not construed so strictly as the former, but more according to the presumable intention of the party creating : as where a testator devises

real estate to trustees to convey it to certain uses, the wishes of the testator are not to be carried out by a strict and literal adherence to the terms of the will, so as to render the direction to convey and settle nugatory: (see *Smith's Man. Eq. Jur.* 14, *et seq.* 5th edit.; 1 *Hughes' Pract. Sales Real Pro.* 345, *et seq.* 2nd edit.)

**Q.**—If a man conveys an estate to trustees upon trust to sell, and pay his debts, will a court of equity, upon a bill by a creditor, compel the performance of the trust?

**A.**—If a debtor voluntarily conveys property in trust for the benefit of his creditors, to whom the conveyance is not communicated, and the creditors are not in any manner privy to the conveyance, the deed merely operates as a power to the trustees, and is revocable by the debtor, and has the same effect as if the debtor had delivered money to an agent to pay his creditors, and before any payment made by the agent or communication by him to the creditors had recalled the money delivered: (see *Story's Eq. Jur.* § 1036 b, and *Acton v. Woodgate*, 2 *Myl. & K.* 492, there cited; *Smith's Man. Eq.* 115, 116, 5th edit.)

**Q.**—If one trustee receives trust money, and hands it over to his co-trustee, are both, or which, of them liable?

**A.**—They will both be liable: (*Story's Eq. Jur.* § 1284; *Smith's Man. Eq.* 166, 5th edit.)

**Q.**—What is the rule in equity as to the purchase by a trustee of the trust estate; and what course would you advise on behalf of a trustee-purchaser in order to assure his title and prevent any after impeachment of it?

**A.**—A trustee cannot purchase of himself, and he is not allowed to become a purchaser of the trust property even at public auction: (*Sug. V. & P. Conc. View*, 48, 543; 1 *Hughes' Pract. Sales Real Pro.* 232, 233, 2nd edit.; and see *Story's Eq. Jur.* §§ 321, 322.) When an estate is vested in trustees upon trust for sale, and a trustee is desirous of becoming a purchaser, the only safe course is to file a bill for the purpose of carrying the trusts into execution under the direction of the court, and apply to become a purchaser on offering to give more than any other person: (1 *Hughes' Pract. Sales Real Pro.* 234, 2nd edit.; and see *Adams on Eq.* 60; *ante*, p. 216.)

**Q.**—A. purchases and pays for a freehold estate, which is conveyed by the vendor to B. C. purchases and pays for Government stock, which is transferred into the name of D. Is there a resulting trust in both or either of these cases in favour of A. or C. upon simple proof of the payment of the purchase money by him? (a)

**A.**—If A. purchases and pays for a freehold estate, which is conveyed by the vendor to B., the trust of the legal estate results to A. And, although the person in whose name the conveyance is taken executes no declaration of trust, yet a trust will result, and may be proved by parol evidence even after the death of the nominal purchaser. But, unless the trust arises on the face of the deed itself, the proofs must be very clear; and it seems very doubtful whether parol evidence is admissible against the answer of the trustee denying the trust: (see *Sug. V. & P. Conc. View*, 556; *Story's Eq. Jur.* § 1201 and note; *Smith's Man. Eq.* 145, 5th edit.) So, if C. purchases and pays for Government stock, which

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(a) Also asked thus: If a person purchases land or securities in the name of another, being a stranger, what is the trust that is implied, and how can it be enforced?

is transferred into the name of D., there is a resulting trust in favour of C., and a parol declaration is admissible as evidence of the intention of the party advancing the money ; and this being a trust of personalty, was never within the Statute of Frauds, or the doctrine of resulting trusts under the statute : (see 1 Myl. & K. 506 ; Smith's Man. Eq. Jur. 145, 5th edit.) But if a man delivers money or transfers stock to another, even though he be a stranger, no implied trust will arise unless upon evidence : (Smith's Man. Eq. 145, 146, 5th edit.)

**Q.**—Can a trustee delegate a power to give receipts ?

**A.**—A trustee empowered to give receipts cannot lawfully delegate such power ; and every trustee who has accepted the trust must join in the receipts : (see *Viney v. Chaplin*, 31 L. T. Rep. 142 ; Sug. V. & P. Conc. View, 516 to 527.)

**Q.**—The Court of Chancery prohibits persons filling certain characters from becoming purchasers ; name the principal of such characters and the ground upon which the prohibition is founded.

**A.**—Generally speaking, trustees who have accepted the trust, agents, commissioners of bankrupts, assignees of bankrupts, solicitors to the commission, auctioneers, creditors who have been consulted on the mode of sale, counsel, or any person who, by being employed or concerned in the affairs of another, has acquired a knowledge of his property, are incapable of purchasing such property. For, if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent : (Sug. V. & P. Conc. View, 543, 544.)

**Q.**—When a trustee invests part of the trust property on a security not within his authority and makes a profit, and in other like investments sustains a loss, how is the account to be taken ?

**A.**—If the trustee makes a profit by investing the trust property, it will belong to the *cestui que trust*, for it is a constructive fraud upon the latter to employ the property contrary to the trust : (Story's Eq. Jur. §§ 465 and note, 1261.) But if any loss should arise in consequence of a violation of the trust, the trustee will be liable to make good the deficiency. He cannot set off the profit against the loss : (Story's Eq. Jur. §§ 1269, 1273, 1274 note, 1277 ; Smith's Man. Eq. 171, &c. 5th edit.)

**Q.**—Are trustees, as such, entitled to any, and what, allowance for expenses or loss of time, or either of them ?

**A.**—Trustees and other persons standing in a similar situation are not allowed any remuneration for their services without some express or implied provision for that purpose. But trustees are entitled without any express provision to defray out of the trust funds expenses legitimately and properly incurred : (Smith's Man. Eq. Jur. 163, 5th edit.)

**Q.**—State the principle upon which the Statute of Limitations cannot be pleaded by a trustee in bar to the claim of his *cestui que trust*.

**A.**—The principle upon which the Statute of Limitations cannot be pleaded by a trustee is, that time will not run against an express trust : (see Smith's Man. Eq. Jur. 123, *et seq.* 5th edit.)

**Q.**—To a bill filed by a *cestui que trust*, is the trustee a necessary party ?

**A.**—Yes ; the trustee must be made a party.

**Q.**—In suits to carry into execution the trusts of a will, in what cases is it necessary or desirable that the heir-at-law should be made a party ?

**A.**—It is ordered, that in suits to execute the trusts of a will, it shall not be necessary to make the heir-at-law a party ; but the plaintiff shall be at liberty to make the heir-at-law a party when he desires to have the will established against him : (see *Ayck. New Ch. Pr. 2.*)

**Q.**—A party entitled to a fund in the hands of trustees executes an assignment of it by way of security for money borrowed ; is anything, and what, besides the assignment, necessary for the effectual security of the lender ?

**A.**—Yes ; notice must be given to the trustees, for in all assignments of equitable interests, other than equitable estates, he who gives notice to the holder of the fund has priority over him who does not : (see *Smith's Man. Eq. Jur. 203, 5th edit.*)

**Q.**—If a trustee, who is an accounting party, be about to go abroad out of the jurisdiction of the court, will a court of equity interpose and compel him to give security, and, if so, what proceedings should be taken to obtain the same ?

**A.**—If a trustee (or executor) who is an accounting party, and is about to quit the realm, equity will interfere by writ of *ne exeat regno* to prevent him from doing so. To obtain the writ a bill must be filed, verified by affidavit : (*Ayck. New Ch. Pr. 222 ; Story's Eq. Jur. §§ 1471, 1473 ; Smith's Man. Eq. 349, 350, 5th edit.*)

**Q.**—When a trustee, who has been appointed by deed and has accepted the trust, refuses to act, what is the proper course to be pursued to obtain an execution of the trust ?

**A.**—If the trustee, having been appointed by deed, accepts the trust and afterwards refuses to act, the *cestui que trust* may compel him by filing a bill against him to perform the duties incident to that character ; for, having once acted, he cannot discharge himself of the obligation : (see *Goldsmith's Eq. Pr. 197, 4th edit. ; Smith's Man. Eq. Jur. 162, 5th edit.*)

**Q.**—If a person has been appointed a trustee without his consent, and has not acted, and is not desirous to act, and a bill is filed against him, what defence should he make ?

**A.**—He must disclaim : (see *Goldsmith's Eq. Pr. ubi sup. ; Ayck. New Ch. Pr. 102.*)

**Q.**—What remedy will a court of equity give in a case where a trustee has been named, but has never acted or accepted the trust, and refuses to do so ?

**A.**—It is a rule in equity, which admits of no exception, that where a trust exists, a court of equity never wants a trustee. For, whenever a trust exists, either by the declaration of the party, or by intendment or implication of law, and it is not extinguished by the countervailing equity of a *bonâ fide* purchaser for valuable consideration without notice, or otherwise entitled to protection, equity will follow the legal estate and decree the person in whom it is vested to execute the trust : (*Story's Eq. Jur. § 976 ; Smith's Man. Eq. 162, 5th edit.*)

**Q.**—Suppose a trust estate to devolve upon an infant, how is such infant to convey for the purposes of the trust ?

**A.**—Where trust estates devolve upon an infant, a remedy is now

provided by the 13 & 14 Vict. c. 60, s. 7, which enables the Court of Chancery to make an order vesting the lands in such person or persons, in such manner and for such estate, as the court shall direct; and the order is to have the same effect as if the infant had been twenty-one years of age, and had duly executed a conveyance or assignment of the lands in the same manner and for the same estate. Or, if more convenient, a person may be appointed to convey: (sect. 20; Will. Real Pro. 59, 60, 4th edit.)

Q.—What relief does a court of equity give when a trustee cannot be found?

A.—The Court of Chancery may make a similar order as in the case of infant trustees: (see sect. 9.) Or, if stock be standing in the name of such trustee, an order to transfer the same, or to receive the dividends or income thereof, or to sue for and recover choses in action, &c., may be made: (s. 22.) Or the court may appoint new trustees: (s. 32.)

Q.—If a trustee becomes lunatic, what relief can the *cestui que trust* obtain?

A.—The Lord Chancellor, being entrusted with the care of the persons and estates of lunatics, may make similar orders, or appoint new trustees as above detailed: (see ss. 3, 5, 32; Will. Real Pro. 59, 4th edit.)

Q.—If a trustee having stock vested in him becomes a lunatic, and a new trustee is appointed, how is the transfer of the stock from the lunatic to the new trustee to be made?

A.—By stat. 13 & 14 Vict. c. 60, it is provided, that when any lunatic shall be solely entitled to any stock upon any trust, the Lord Chancellor may make an order vesting the right to transfer such stock, or to receive the dividends and income thereof, in any person or persons he may appoint: (sect. 5.) The person or persons in whom the legal right to transfer stock is vested, is thereby authorised to execute deeds and powers of attorney, and perform all acts relating to the transfer of such stock into his or their names, or otherwise, or relating to the receipt of the dividends thereof, to the extent and in conformity with the terms of such order: (see sect. 26.)

Q.—Can the court interfere if the trustee be also beneficially interested in the fund?

A.—Yes; the court may interfere, although the trustee has some beneficial interest in the subject of the trust: (see sect. 2.)

Q.—What course can a trustee take who is desirous of avoiding future responsibility, and obtaining the protection of the court; and what are the practical proceedings necessary, and to whom must notice be given? (a)

A.—Formerly (with few exceptions) to obtain the protection of the court, and avoid future responsibility respecting trust property, a suit must have been instituted, but by the 10 & 11 Vict. c. 96, trustees are empowered to pay the trust money into court, in the matter of the particular trust, in trust to attend the orders of the court. An affidavit must be filed by the trustee intituled in the matter of the act and of the trust, and setting forth: 1st, his name and address; 2ndly, the place where he may be served with any proceedings; 3rdly, the amount of the

(a) Also asked thus: State shortly the mode by which a trustee may relieve himself from responsibility in respect of a fund held in trust for a person of unsound mind.

trust fund to be paid in ; 4thly, a short description of the trust, and the instrument creating it ; 5thly, the names of the *cestui qui trust* ; 6thly, the submission of the trustee to answer all inquiries made or directed by the court relating to the application of the trust funds paid in : (1st Order, 10th June 1848.) On production of an office copy of this affidavit the Accountant-General will give the necessary directions for transfer or deposit, and to place the stock, &c. to the account of the particular trust. The trustee having made the payment, &c. is forthwith to give notice to the several persons named in the affidavit as interested in or entitled to the trust fund : (3 *id.* ; Ayck. New Ch. Pr. 330, &c. ; and see Order, 12th Nov. 1856.) (a)

**Q.**—What is the course of proceeding on the part of persons beneficially entitled to the funds referred to in the last question, to enable them to get out the funds, and on whom must notice be served ?

**A.**—The persons interested in or entitled to the funds, or any of them, may apply by petition as occasion may require, respecting the investment, payment out, or distribution of the fund, or of the interest or dividends thereof. But the trustee is to be served with notice of such application: (4th and 5th Orders, June 1848.) Where, however, the trust-fund does not exceed 300*l.*, cash or stock, the application may be made by summons instead of petition : (Order 12th Nov. 1856.)

## ADMINISTRATION.

**Question.**—What is meant by the adjustments between creditors and legatees, and between debtor and creditors, made by courts of equity, and commonly called marshalling of assets ?

**Answer.**—Marshalling of assets may be defined to be such an arrangement of the different funds of the common debtor of two or more creditors as may satisfy every claim, so far as, without injustice, such assets can be applied in satisfaction thereof, notwithstanding the claims of particular individuals to prior satisfaction out of some one or more of such funds. So that, if there are two or more different kinds of funds of the common debtor of several creditors, and at law one can have recourse to either of those funds, while another is confined to one of them, the former shall either be compelled to seek satisfaction out of that fund to which the latter cannot resort, so far as it will extend, or the latter shall receive compensation out of that fund in proportion to the amount which the former has unnecessarily taken from that which formed the only source of payment for the latter. This plan is adopted with regard to creditors

(a) And by the 22 & 23 Vict. c. 35, a trustee, executor, or administrator may apply, by petition to the court, or by summons at chambers, for the opinion and direction of the judge on any question touching the management of the trust property or assets ; and all parties interested are to have notice of the application. And the trustee, &c., acting in accordance with the advice or direction of the judge, is freed from responsibility, unless he has been guilty of fraud or misrepresentation in obtaining such advice or direction: (sect. 30 ; see also ss. 31, 32.)

of a superior rank in favour of legatees, as where specialty creditors have exhausted the personal estate. Also, where lands are subjected to the payment of all debts, legatees are allowed to stand in the place of simple contract creditors, who have exhausted the personal estate : (see Story's Eq. Jur. § 558, *et seq.* ; Smith's Man. Eq. 230, 231, 5th edit.)

Q.—What is the order in which, under a decree, assets of various descriptions are administered for the payment of debts ?

A.—Assets are now generally applied in the payment of debts in the following order : 1st. The general personal estate is applied ; 2ndly, any estate particularly devised simply for the payment of debts ; 3rdly, estates descended ; 4thly, estates devised to particular devisees, but charged with the payment of debts : (Story's Eq. Jur. § 577.) But although the personal estate is the primary fund for payment of debts, still it may be exonerated either by express words or a plain intention of the testator ; or where the debt, charge, or incumbrance is in its own nature real. Also, where the debt was contracted not by the person who died last seised or entitled, but by some other person from whom he took it by descent, or from some other person from whom he purchased it, or from whom his vendor derived it : (see Story's Eq. Jur. §§ 571 to 576, 1003 ; Smith's Man. Eq. Jur. 223, *et seq.* 5th edit.)

Q.—Explain the difference between *legal* and *equitable* assets, and state how each are administered among creditors.

A.—Legal assets are property which the law vests, or would have vested, in the executor or administrator, as such, for the payment of debts generally. Equitable assets are such property as would not have vested in the executor or administrator by law, but vest in him for payment of debts generally, simply by virtue of an express disposition of the property, and can be reached only by the aid of a court of equity : (Story's Eq. Jur. §§ 551, 552 ; Smith's Man. Eq. 221, 5th edit.) In administering assets among creditors equitable assets are administered, *pari passu*, among all the creditors without regard to priority of debts, on the maxim that equality is equity. But even in equity, where the assets to be administered are legal, the creditors are paid according to their legal priorities : (Story's Eq. Jur. §§ 553, 554 ; Smith's Man. Eq. Jur. 221, 222, 5th edit.) 1. Reasonable funeral and testamentary expenses. 2. Debts due to the Crown. 3. Debts due to the Post-office up to 5*l.*, or from the deceased as overseer. 4. Debts due on judgments and decrees. 5. Debts due on recognizances. 6. Specialty debts, and arrears of rents, &c. 7. Debts on simple contract : (Allnutt's Pract. Wills & Adms. 282, *et seq.* 3rd edit. ; Matthews' Guide to Exors. 157 to 168, 2nd edit.)

Q.—Where there are specialty, simple contract and judgment creditors, are any of them, in the event of a deficiency, entitled to a priority of payment ? And, if so, state their priorities.

A.—Yes ; the judgment debts must be paid first, those by specialty follow, and the simple contract debts last : (Allnutt, *ubi sup.* ; Matthews' Guide to Exors. 157, *et seq.* 2nd edit.) Unless, indeed, the assets are equitable, in which case all the creditors must abate proportionably : (Story's Eq. Jur. §§ 552, 554.)

Q.—A testator, by his will, charges his real estate with the payment of an annuity and the legacies given by his will. The personal estate is absorbed, and the real estate is insufficient to keep down the payments of

the annuity. What is the effect upon the annuity and legacies under these circumstances?

A.—If the assets are not sufficient to pay all the debts and legacies, the *general* legacies must first abate proportionably for this purpose; and, if necessary, the whole amount of them must be applied. If the assets be still insufficient for the payment of debts, the *specific* legacies must next abate proportionably, or be wholly applied if necessary: (Matthews' Guide to Exors. & Adms. 208, 2nd edit.) In the question put, the annuity will have priority over the legacies, and will not abate. The annuity falls under the denomination of a demonstrative legacy; and, though not a specific legacy, it is so far of the nature of one that it will not be obliged to abate with general legacies: (see Matthews' Guide to Exors. & Adms. 209, 2nd edit.; and see Wms. Exors. 695, 4th edit.)

Q.—What is meant by the marshalling of securities?

A.—Marshalling of securities bears a close analogy to the marshalling of assets, which has already been considered. The general doctrine is, that if a creditor has a lien on, or interest in, two funds belonging to one person, and another creditor has a lien on, or interest in, one only of the funds, and the claims of both could not be satisfied if the former were to resort to that fund to which alone the latter is entitled, there the latter creditor has a right in equity to compel the former to resort to the other fund in the first instance for satisfaction, whenever it will not operate to the prejudice of the party entitled to the double fund, or to the common debtor: (Story's Eq. Jur. §§ 633, 642; Smith's Man. Eq. Jur. 290, 5th edit.)

Q.—State the case in which it is advisable to administer the estate of a deceased person under a decree of a court of equity, and the effect of a decree for that purpose with reference to these cases?

A.—It is advisable to administer the estate under a decree of a court of equity in all cases of doubt, or where it is apprehended that certain creditors will obtain priority or harass the executors by proceedings at law. So, where equitable assets are to be administered, or the assets require marshalling. When a decree is made in the suit, an injunction may be issued to stay proceedings at law or proceedings in any other suit: (see Story's Eq. Jur. § 549; Smith's Man. Eq. Jur., tit. "Administration," 5th edit.) But by the 22 & 23 Vict. c. 35, executors, administrators and trustees may take the opinion and advice of a judge, either on petition or summons, and if they act in conformity with that advice, they are free from responsibility: (22 & 23 Vict. c. 35, s. 30, and more fully *ante* p. 238, note.)

Q.—Is there any mode of proceeding by which the executors or administrators of a deceased person may obtain protection through the medium of a Court of Chancery in respect of the debts and liabilities of the parties whom they represent, without an administration suit?

A.—By the 13 & 14 Vict. c. 35, s. 19, it is enacted, that it shall be lawful for the court, upon the application of the executors or administrators of any deceased person, by order to be made on motion or petition of course, and to be in the form or to the effect set forth in the schedule to the act, with such variations as circumstances may require, to refer it to one of the judge's chief clerks (15 & 16 Vict. c. 86), to take an account of the debts and liabilities affecting the personal estate of such deceased person, and to certify thereon. But it is provided that no such order shall be made until the expiration of one year next after the death



of such deceased person, or pending proceedings to administer the estate of such person; and in case at any time after the making of such order any decree or order for administering the estate of such deceased person shall be made, it shall be lawful for the court, by such decree or order, to stay or suspend the proceedings, under the order of course, upon such terms as to the court shall seem meet. After the certificate the executors are protected as under a decree: (see *Ayck. New Ch. Pr.* 433, &c.; and see 22 & 23 Vict. c. 35, s. 30, *supra.*) *See 29.*

Q.—If a testator by his will charges his real estates with the payment of his debts, will or will not such a devise have any, and, if any, what, effect on a debt which had been previously barred by the Statute of Limitations?

A.—Debts actually barred by the Statute of Limitations are not included in a trust for payment of debts: (*Smith's Man. Eq. Jur.* 222; 5th edit.)

Q.—Where the personal estate has been exhausted in paying specialty debts, have the simple contract creditors any claim against the real estate of the testator?

A.—Yes; the simple contract creditors will, in equity, stand in the place of the specialty creditors against the real assets, so far as the latter shall have exhausted the personal assets in payment of their debts, and no further: (*Story's Eq. Jur.* § 562; *Smith's Man. Eq. Jur.* 233, 5th edit.) This, it will be remembered, is the marshalling of assets before considered. But see hereon 3 & 4 Will. 4, c. 104.

Q.—A trader, within the meaning of the bankrupt laws, dies seised of real estate, and which he has devised by his will, but not thereby charged with the payment of his debts, and which estate would be assets in the hands of the heir for the payment of specialty debts. Can simple contract creditors obtain any, and what, assistance from a court of equity in discharge of such simple contract debts, and under what authority?

A.—By the statute 3 & 4 Will. 4, c. 104, all estates in fee simple (which includes copyhold estates), which the owner shall not by his will have charged with the payment of his debts, are now liable to be administered in a court of equity for the payment of all the just debts of the deceased owner, as well debts on simple contract as on specialty. But, out of respect to the ancient law, the act provides that all creditors by special contract, in which the heir is bound, shall be paid in full, before the creditors by simple contract or by specialty, in which the heir is not bound, shall receive any part of their demands: (*Will. Real Pro.* 65, 66, 4th edit.; and see *ante*, p. 168.)

Q.—To what extent can equity relieve creditors by or out of the copyhold property of persons dying seised of such property, and which persons shall not have charged such property with the payment of their debts?

A.—As before seen, the 3 & 4 Will. 4, c. 104, renders copyhold as well as freehold estates liable to the payment of all the just debts of the deceased owner, as well those by simple contract as by specialty: (see further *supra.*)

Q.—What protection does a court of equity afford to creditors of persons deceased?

A.—The protection acquired by creditors, through the aid of a court of equity, is, the marshalling of assets and securities, and the equal

administration of the deceased's estate : (see Story's Eq. Jur. §§ 552, 554, 558, 633, &c.)

Q.—State the several proceedings which may be adopted by a creditor who finds it necessary to resort to a court of equity to enforce the payment of a debt due from his deceased debtor, and the usual stages of such proceedings.

A.—A creditor may have a deceased person's estate administered in the Court of Chancery, either by bill, ~~claim~~, or summons at chambers. Where the latter proceeding can be adopted it is generally resorted to. The 15 & 16 Vict. c. 16, s. 56, provides that any person claiming to be a creditor, &c. may obtain, without bill ~~or claim~~ ~~filed~~, a summons from the Master of the Rolls, or one of the Vice-Chancellors, requiring the executor or administrator to attend before him at chambers to show cause why an order for the administration of the personal estate of the deceased should not be granted; and upon proof of service, or on appearance, and upon proof of such other matters as the judge may require, such judge may make the usual order for administration. So, an order may be obtained for the administration of real estate, in like manner, where the whole of such real estate is by devise vested in trustees empowered by the will to sell and give receipts: (sect. 47.) The matter is, in practice, heard before the judge's chief clerk, and not before the judge. A copy of the summons is left at the judge's chambers, and the chief clerk gives an appointment for hearing the summons. A duplicate of the summons must be filed with the Clerk of Records and Writs, and the summons is then served on the executor; an appearance must be entered by the executor at the Record and Writ Clerk's Office before he can be heard. At the hearing, the parties attend before the chief clerk, and the matter is discussed, when he may make the usual order: (see Ayck. New Ch. Pr. 6th edit., and following answer.)

Q.—Set forth the several stages of an administration suit down to a final decree, distributing the funds brought into court to the various classes of persons usually entitled when the assets are more than sufficient to pay debts and legacies.

A.—Suits for administration ~~may be commenced by bill or by claim~~. The proceedings down to decree are the same as in ordinary cases. The order or decree made at the hearing is not final, but directs an account to be taken of the testator's debts and funeral expenses. It also frequently becomes necessary to ascertain who is the heir-at-law, or who are the next of kin of such testator; in which case the inquiry for such purpose takes place at chambers. A copy of the decree or order, and a copy of the bill, and a note stating the names of the solicitors and for whom each acts, should be left with the judge's chief clerk, and a summons prepared, issued and served on all necessary parties in the usual way. The executor's account is then brought in, and the chief clerk proceeds to take the same, and allows or disallows the items. After this, inquiries for next of kin, &c. are made, and when this is done the chief clerk makes his certificate, and the cause is then brought on and heard upon further considerations, when a final decree may be made. The surplus, after paying debts and legacies, will be distributed among the next of kin: (see Ayck. Ch. Pr. 368, 382, 421, 439, 4th edit., and see *ante*, p. 271.) But whenever any fund in court is to be dealt with, the Accountant-General's certificate, and, if the funds are restrained by

any order, the restraining order, or an office copy thereof, must be left. When payment out of court is ordered to executors or administrators, the probate or letters of administration must be left: (Ayck. Ch. Pr. 310, 4th edit.) An order for administration may now, as above stated, be obtained on summons at chambers.

*Q.*—Suppose A. and B. both file claims to have the estate of C. administered by the court, which is entitled to priority; and how, and upon what terms, is the one entitled to stay proceedings in the other suit?

*A.*—A's suit being the first will, as a general rule, be entitled to priority; and the court will stay the proceedings in B's suit until further order, giving liberty to B. to apply, and reserve the question of costs. But in such case the question always is, whether the latter suit asks anything more than can be obtained in the former. If the bill or claim in the second suit should pray for further relief than can be had in the first, the court will not stay the proceedings in it. But the proceedings in the first suit may be stayed: (see Ayck. Ch. Pr. 261 to 263; Hallilay's Ch. Suit, 82, 83.)

*Q.*—Is a creditor whose debt does not, by law, carry interest, entitled to any, and, if any, what, interest on such debt when established under a decree or order in a suit; and, if so, under what circumstances?

*A.*—A creditor whose debt does not, by law, carry interest, who shall come in and establish his debt before the Master under a decree or order in a suit, is entitled to interest upon his debt, at the rate of four pounds per cent., from the date of the decree, out of any assets which may remain after satisfying the costs of the suit, the debts established, and the interest of such debts as by law carry interest: (46th Order, Aug. 1841; and see Ayck. Ch. Pr. 384, 385; Smith's Ch. Pr. 357, 5th edit.)

*Q.*—A person conveys his estate to trustees upon trust to sell, and apply the proceeds of the sale in discharge of all his bond debts, and the interest then due and to grow due thereon up to the day of payment. Upon taking the account it is found that the principal and interest upon some of them exceed the penalty of the bond. In this case are the obligees entitled to the excess? If not, state the reason why?

*A.*—The obligees are not entitled to the principal and interest beyond the penalty of the bond, this not being allowed by the courts: (see Smith's Ch. Pract. 325, 2nd edit.)

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## DEVISE AND ELECTION—LEGATEES AND EXECUTORS.

*Question.*—If money is directed by a testator to be laid out in land for particular purposes, and these purposes should fail of taking effect, does it belong to the heir or next-of-kin?

*Answer.*—Where, in the events that happen, the contemplated object for which a conversion of money into land (or land into money) was to

be made, does not exist, the court will not vary the property from that state in which it was found at the death of the testator; for where the purpose fails, the intention fails: (Smith's Man. Eq. Jur. 139, 5th edit.) Therefore the next-of-kin, and not the heir, will be entitled to it. But if any event shall have happened on which the conversion ought to take place, though the object of the conversion afterwards ceases to exist, the property will be treated as if converted: (see Smith's Man. Eq. Jur. 139, 140, 5th edit.)

Q.—What is the doctrine of election ?

A.—Election is the choosing between two rights by a person who derives one of them under an instrument in which a clear intention appears that he should not enjoy both: (Smith's Man. Eq. Jur. 303, 5th edit.)

Q.—An estate is absolutely limited by settlement to a married woman in the event of her surviving her husband; the husband, misconceiving his rights, devises the estate to a third party by will; and, by the same will, bequeaths a legacy to his wife. On his death, can the wife claim both her estate and the legacy; or what are the respective estates of the wife and devisee?

A.—The wife cannot claim both her estate and the legacy, but she will be put to her election: if she elects to keep her estate, the legacy given her by the will will be applied in compensation of the disappointed devisee: (see 1 Hughes' Pract. Sales, 378, 381, 384, 2nd edit.; Smith's Man. Eq. 303, 304, 5th edit.)

Q.—If A., by his will, bequeaths B.'s property to C., and gives a legacy to B., can B. insist on being paid the legacy, and retain the property bequeathed by A.?

A.—No; he will be put to his election: (see 1 Hughes' Pract. Sales, *ubi supra*; Story's Eq. Jur. § 1075, *et seq.*; Smith's Man. Eq. Jur. 304, 5th edit.)

Q.—In what case is a legacy in money to a creditor of the testator considered in equity to be an extinguishment of the debt?

A.—A legacy given to a creditor, if it is of equal amount to the debt, and in other respects equally beneficial, will, in general, in the absence of countervailing circumstances, be deemed to be a satisfaction of the debt, on the principle that a testator shall be just before he is generous. If, however, there is an express provision in the will for payment of debts, this rule does not prevail; nor where the gift is of a residue, nor where the debt is a negotiable security: (Story's Eq. Jur. §§ 1119, 1120; Smith's Man. Eq. 314, 5th edit.)

Q.—A father bequeaths to a child a legacy of 1,000*l.*, and afterwards, in his lifetime, gives to the same child a portion of 1,000*l.*; on the father's death can the child claim the legacy, and would it be the same if the legacy was a gift of the residue only?

A.—In the absence of evidence to the contrary, the portion given to the child, by the father, in his lifetime, will be deemed a satisfaction or ademption of the legacy. The ground of this doctrine is, that the legacy given by the parent to the child is presumed to be intended as a portion, and if he afterwards advances the same amount to the same child, he does it to accomplish his original object—as a portion. But this rule does not apply to a gift of the residue, which is always changing in amount: (Story's Eq. Jur. §§ 1111, 1112; Smith's Man. 311, 312, 5th edit.)

**Q.**—Is the ademption of a legacy applicable to strangers as well as to children ?

**A.**—The doctrine of the constructive ademption of legacies has never been applied to legacies given to mere strangers, unless under some peculiar circumstances : as where the legacy is bequeathed for a particular purpose, and a portion is afterwards given by the testator by an act *inter vivos* exactly for the same purpose, and for none other. The reason commonly assigned for this doctrine is, that in the case of a legacy to a stranger the legacy is a mere arbitrary gift, unconnected with any consideration of duty or parental affection ; and there is no reason why a person may not be entitled to as many gifts as another may choose to bestow upon him : (Story's Eq. Jur. §§ 1117, 1118 ; Smith's Man. Jur. 312, 5th edit.)

**Q.**—From what time does the interest of a legacy given by a parent to his child commence ?

**A.**—Whenever a legacy is given by a father to his child, as a provision for such child, though payable at a future day, the child has a right to the interest of the money from the testator's death : (Smith's Man. Eq. Jur. 93, 5th edit ; Allnut's Pract. Wills & Adms. 335, 3rd edit.)

**Q.**—Is a pecuniary legatee entitled to interest ; and, if so, from what time, and at what rate of interest, where no time or rate of interest is mentioned in the will ?

**A.**—The legatee is entitled to interest, at 4*l.* per cent., from a year after the death of the testator, when no time or rate of interest is fixed by the will : (see Allnut's Pract. Wills & Adms. *ubi supra*.)

**Q.**—Where a legacy is charged on real and personal estate, and the legatee dies before the day of payment, how is the legacy treated ?

**A.**—It is a well-established rule, that where a legacy given to a party is charged upon both real and personal estate, or on realty only, and the time of payment has respect to the *legatee personally*, and not the *estate or convenience of the owner*, as where it is given to a legatee at twenty-one or marriage, the legacy, so far as it is charged on the realty, lapses by reason of the death of the legatee before the day of payment, and the personal estate only remains charged. But where the legacy charged on the real estate has regard to its postponement to the estate itself, or its owner, and not to the legatee, the rule is different, and the legacy does not lapse by the death of the latter before the time of payment : (see Goldsmith's Eq. Pr. 190, 191, 4th edit. ; Smith's Man. Eq. 92, 5th edit.)

**Q.**—What is the effect of the Statute of Limitations on a legacy ?

**A.**—A legacy cannot be recovered but within twenty years next after a present right to receive the same has accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money, or some interest thereon, has been paid, or some acknowledgment of the right thereto shall have been given in writing, and signed by the person by whom the same shall be payable or his agent ; in such case, the time runs from such payment or acknowledgment, or the last of them, if more than one. And only six years' arrears of interest on the legacy can be recovered : (see 3 & 4 Will. 4, c. 27 ; Sug. Real Pro. Stats. 116, 131 ; Browell's Real Pro. Stats. 57, *et seq.*)

**Q.**—Define a specific legacy and a general legacy, and state whether,

in case of a deficiency of assets, specific legacies can be required to abate ?

A.—A legacy is said to be specific when it is a gift of a specified part of the testator's property, which is so distinguished (Allnutt's Pract. Wills. & Adms. 312, 3rd edit.) A general legacy is not so distinguished. Thus, the bequest of *a* diamond ring is a general legacy, and will be satisfied by the delivery of any diamond ring ; but a bequest of "*the* diamond ring presented to me by A." is a specific legacy, and can only be satisfied by the delivery of the particular ring. If there is not enough to pay all the debts and legacies in full, general legacies must abate proportionably ; but specific legacies do not abate at all, except for payment of debts, if there is not enough without them : (Matthews' Guide to Exors. & Adms. 180, 181, 2nd edit. ; Allnutt's Pract. Wills. & Adms. 313, 321, 3rd edit.)

Q.—If a legacy is given on condition that the legatee shall not dispute the will, what will a court of equity decree ?

A.—That he be put to his election ; he cannot claim the legacy and dispute the will : (1 Hughes' Pract. Sales, 378, 380, 2nd edit. ; see also *Wright v. Wilkin*, 33 L. T. Rep. 277.)

Q.—By what summary process can a legatee, or creditor, or next-of-kin of a deceased person procure the administration of his real or personal estate ?

A.—Any person claiming to be a creditor, or a specific pecuniary or residuary legatee, may obtain, without bill ~~or claim~~ filed, or any other preliminary proceedings, a summons from the Master of the Rolls, or any of the Vice-Chancellors, requiring the executor or administrator to attend before him at chambers, to show cause why an order for the administration of the personal estate of the deceased should not be granted ; and upon proof of service, or on appearance, and upon proof of such other matters as the judge may require, such judge may make the usual order for administration, which shall have the effect of a decree made on the hearing of a cause : (15 & 16 Vict. c. 86, s. 45.) So, any person claiming to be a creditor of any deceased person, or interested under his will, may obtain, in a similar manner, an order for the administration of the real estate of a deceased person, where the whole of such real estate is by devise vested in trustees empowered by the will to sell such real estate, and give receipts for the rents and profits, and the produce of the sale thereof : (sect. 47 ; Ayck. New Ch. Pr. 439 ; *ante*, p. 242.)

Q.—If an annuitant under a will dies before the day of payment, is any portion of the annuity payable in that case, and under what authority ?

A.—The annuity will be apportioned so that his representatives will be entitled to a proportion thereof according to the time which has elapsed from the commencement or last period of payment (as the case may be), under the authority of the statute 4 Will. 4, c. 22 : (see Allnutt's Pract. Wills & Adms. 245, 246, 3rd edit. ; Browell's Real Pro. Stats. 174.)

Q.—What relief does equity give to a legatee when the executor withholds payment of the legacy ; and what takes place if the executor does not admit assets ?

A.—On the legatee applying to a court of equity, the executor will be decreed to pay the legacy. If the executor does not admit assets, equity

will compel a discovery and account : (see Story's Eq. Jur. §§ 534, 535, 591 to 593, 602 ; Matthews' Guide to Exors. & Adms. 316, 2nd edit.)

Q.—Is an executor liable in equity to make good a loss arising from acts done by him not authorised by the will creating the trust ?

A.—Yes ; the executor will be liable to make good the loss : (see Smith's Man. Eq. Jur. tit. 11, ch. 7, 5th edit.)

Q.—May an executor file a bill before he has obtained probate ; and, if so, in what stage of the suit must he obtain it ?

A.—An executor may file a bill before obtaining probate ; but he must obtain it before the suit is brought to a hearing : (Allnutt's Pract. Wills & Adms. 249, 3rd edit.)

Q.—In the case of a will of doubtful construction, how are the executors to proceed so as to avoid personal responsibility ?

A.—They must either have the assets administered under a decree of a court of equity (Smith's Man. Eq. Jur. 182, 5th edit. ; Ayek. Ch. Pr. 432, 4th edit.), or take the opinion of a judge, as before detailed : (see *ante*, pp. 238, n., 240.)

Q.—Is an executor allowed his reasonable expenses out of the trust fund ?

A.—An executor is allowed his reasonable expenses incurred in the execution of his office, unless occasioned by his wilful default ; but nothing for personal trouble and loss of time : (Matthews' Guide to Exors. & Adms. 319, 2nd edit.)

Q.—What is the equitable principle upon which a legatee is entitled to file a bill against an executor ?

A.—It is, that in most cases the legatee has no adequate remedy in any other court, and would therefore be without a remedy : (see Story's Eq. Jur. §§ 593 to 595 ; Smith's Man. tit. "Legacies," 5th edit.)

Q.—An executor has advertised for creditors of his testator ; has paid all debts of which he had notice, and those are by simple contract ; and he has distributed the residue among the legatees without any decree having been made for the administration of the estate. Afterwards a specialty creditor, of whose debt he had no notice or knowledge, files a bill for the administration of the estate. In taking the account, is the executor entitled to take credit for the payments made to simple contract creditors, and to the legatees, or to either, and which of them ?

A.—If the executor has paid away the residue in ignorance of any debt, he is still liable : (Smith's Man. Eq. Jur. 179, 5th edit.) If, however, the executor has, by mistake, but *bonâ fide*, and without fault, paid legatees before a due discharge of all the debts, the latter will be treated as trustees for the purpose of paying the debts ; because simple contract as well as specialty debts are entitled to priority over legatees, who are not entitled to anything except the surplus of the assets after all the debts are paid : (Story's Eq. Jur. § 1251 ; and see Matthews' Guide to Exors. and Adms. 153, 2nd edit. ; *Fuller v. Redman*, 33 L. T. Rep. 313.) And now by the 22 & 23 Vict. c. 35, it is provided, that where the executor or administrator shall have given such notices as would have been given by the Court of Chancery in an administration suit for creditors to come in and prove their claims against the deceased's estate, such executor or administrator shall, at the expiration of the time named in the said notices, be at liberty to distribute the assets, or any part thereof, amongst the parties entitled, having paid the claims of which he

has notice ; the executor or administrator is then protected against claims of which he has not notice. But still legatees are liable to refund to creditors : (sect. 29.)

**Q.**—Is an executor justified in paying a simple contract debt before a specialty debt, or one simple contract or specialty debt before another simple contract or specialty debt?

**A.**—The executor must pay the debts according to their priority ; for if he pays those of a lower degree, without leaving enough to satisfy those of a higher, he will have to pay the latter out of his own estate. But among creditors of equal degree he may pay one debt in preference to another : (Allnutt's Pract. Wills & Adms. 282, 291, 3rd edit. ; Matthews' Guide to Exors. & Adms. 153, 171, 2nd edit. ; Smith's Man. Eq. Jur. 229, 5th edit.)

**Q.**—Can a creditor, who is appointed executor, retain a debt due to himself in preference to other creditors of equal degree?

**A.**—If the creditor is appointed executor, he may retain his own debt in preference to any other creditor of equal degree : (Allnutt's Pract. Wills. & Adms. 294, 3rd edit.) Although his debt is statute barred : (*Sharman v. Rudd*, 31 L. T. Rep. 325.)

**Q.**—If an executor improperly retains large balances of his testator's estate in his hands, what remedy will a court of equity afford against such executor?

**A.**—If, after a year from the testator's death, the executor retains money in his hands, lying dead, without apparent reason, he will be chargeable with 4l. per cent. interest on the fund so retained : (see Goldsmith's Eq. Pr. 199, 4th edit. ; Matthews' Guide to Exors. & Adms. 318, 2nd edit.) And equity will compel the executor to discover and account for the assets and their application : (see Matthews' Guide to Exors. & Adms. 316, 2nd edit.)

**Q.**—A testatrix bequeaths a charitable legacy of 900l., and charges it on all her property, which consists of 6,000l. realty, 4,000l. mixed, and 2,000l. pure personalty ; what amount will the charity be entitled to receive, and on what principle?

**A.**—If, by the language of the will, there is no intention to exempt the personal estate from its ordinary obligation to discharge the debts and legacies as the primary fund for the purpose, the legacy, not being within the Statute of Mortmain (see *ante*, p. 210), would be payable out of the pure personalty, and the charity be entitled to receive the full amount of the legacy ; unless, indeed, the debts had exhausted the personal estate, for then the legacy must fail : (see further Roper on Leg. 670, *et seq.* 4th edit. ; Matthews on Exors. tit. "Legacies," 2nd edit.)

**Q.**—Will a court of equity sustain a bequest of money to executors to build almshouses or an hospital in case any person should, within a limited time, purchase or give land as a site? What law was supposed to stand in the way of such a bequest, and what is now the established doctrine as to this?

**A.**—It was held (by the Master of the Rolls, in accordance with the case of *The Attorney-General v. Davies* (9 Ves. 535) and other cases, that a bequest like this was within the Statute of Mortmain (9 Geo. 2, c. 36), and consequently void. This was a case where a testator by his will, after stating that he had contemplated erecting and endowing almshouses, but that if he should die without effecting such



object, and any person should, within twelve months after his decease, purchase or give a suitable site to be devoted to such purpose, he directed his executors, as soon as such site should be dedicated to charitable uses, to pay to the trustees of the intended charity, out of his personal estate, the sum of 60,000*l.* Within the twelve months after his death a person gave a site and dedicated it in due form. Held (overruling the decision of the Master of the Rolls), that the bequest was not void under the Mortmain Act : (*Philpot v. St. George's Hospital; Attorney-General v. Philpot*, 30 L. T. Rep. 15.) Where a testator directs that the money is to be laid out upon land already in mortmain, and also if he directs that the land shall be procured from any other person who will give it, without reward to himself, and dedicate it to the purpose of the charity, in such cases the bequest is good : (*ib.*)

**Q.**—Can an executor, by any, and what, means give priority to one creditor of his testator over others after a bill has been filed to administer the estate?

**A.**—Even after a bill for administration has been filed it seems an executor may give priority to a creditor who sues him at law, and obtains a judgment *before a decree is actually made* : (see Matthews' Guide to Exors. & Adms. 172, 2nd edit.) But where execution is not taken out before the decree it cannot be taken out afterwards : (*ib.*)

**Q.**—Is an executor justified in paying a debt of his testator which is barred by the Statute of Limitations?

**A.**—Yes ; an executor is justified in paying a debt of his testator which is barred by the Statute of Limitations, as it has been held that he is not bound, and cannot be compelled, to plead the statute : (see Will. Exors. 1535, 4th edit. ; *Sharman v. Rudd*, 31 L. T. Rep. 325.)

**Q.**—Under the usual decree for the administration of an estate, is an executor or administrator entitled to retain a debt due to himself, in preference to other creditors of an equal degree?

**A.**—In *Nunn v. Barlow* (1 Sim. & Stu. 588), it was held, that the personal representative may retain his own debt (of equal degree), notwithstanding a decree has been made in a suit, by the other creditors, for the equal administration of the assets, and notwithstanding the assets, out of which he seeks to retain his debt, came to his hands after the decree : (see Allnutt's Pract. Wills and Adms. 295, 3rd edit. ; Matthews' Guide to Exors. & Adms. 155, 2nd edit.) And even though his debt is statute barred : (*Sharman v. Rudd*, 31 L. T. Rep. 325.)

**Q.**—In what way does the filing of a bill for the administration of a testator's estate affect the executor's right to deal with the assets?

**A.**—As above seen, the mere filing of the bill for administration does not deprive the executor of all power over the assets, but as a decree in equity is held of equal dignity and importance with a judgment at law, a decree on a creditor's bill for administration of assets, being for the benefit of all the creditors, makes them all creditors by decree upon an equality with creditors by judgment, so as to exclude, from the time of such decree, all preference in favour of the latter : (see Story's Eq. Jur. §§ 456, 547, and the cases there cited.) And as soon as the decree to account is made in such suit, if any creditor should sue the executor at law, or proceed against him in any other suits, he is entitled to an injunction out of Chancery to restrain such creditors from so doing, except under the direction and control of the court, where the decree is passed : (*ib.* 549 ; and see Ayck. Ch. Pr. 257.)

**Q.**—Where a party, sole or surviving executor, dies intestate, how is a legal personal representative of the original testator constituted?

**A.**—When a sole or surviving executor dies after probate, intestate, a legal personal representative is constituted by taking out administration *de bonis non*: (Allnutt's Pract. Wills & Adms. 192, 3rd edit.)

**A.**—In a suit for the administration of an estate, one of two executors, defendants, dies pending the suit: is the suit thereby abated; and is it necessary to bring the representatives of the deceased executor before the court; and for what purpose?

**Q.**—The death of one of two executors (if not an accounting party) is no abatement of the suit: (see 1 Smith's Ch. Pr. 657, 3rd edit.; Rede. Pl. 46, 3rd edit.)

### SPECIFIC PERFORMANCE.

**Question.**—How does the remedy given by a court of equity for the non-performance of a contract differ from that given by a court of law?

**Answer.**—In the case of non-performance of contracts, not comprising a public duty, a court of law can, as formerly, only award damages, notwithstanding the C. L. P. Act 1854, s. 68 (see *Benson v. Paull*, 27 L. T. Rep. 78); whilst a court of equity compels the specific performance thereof: (see Story's Eq. Jur. § 714, *et seq.*; Smith's Man. Eq. 186, 5th edit.)

**Q.**—When will a court of equity not enforce a contract for specific performance?

**A.**—When there is no contract in writing, and no part performance thereof. Where the parties are incompetent to contract, such as infants. Nor where the terms are not certain and definite. Nor in the absence of a valuable consideration. Where the agreement is contrary to law, or in other respects inequitable, or against public policy. Where the party seeking the specific performance has not performed his part of the agreement. Nor will equity interfere where damages would amount to a complete compensation: (see Smith's Man. Eq. Jur. tit. 2, ch. 8, 4th edit.)

**Q.**—Where a party engages for the performance of an agreement under a certain penalty, can the party relieve himself from the performance by offering to pay the penalty, or will equity, notwithstanding, compel the performance?

**A.**—A person cannot evade performance of his contract by payment of the penalty for breach of it: (Sug. V. & P. Conc. View, 158; Smith's Man. Eq. Jur. 212, 5th edit.)

**Q.**—Will a court of equity decree a specific performance of an agreement for reference to arbitration? And give the reason for your answer.

**A.**—Courts of equity will not enforce the specific performance of an agreement to refer any matter, deeming it against public policy to.

exclude any person from the appropriate tribunals : (Story's Eq. Jur. § 1457 ; Smith's Man. Eq. 207, 5th edit ; *Horton v. Soyer*, 33 L. T. Rep. 287 ; see also *Scott v. Avery*, 28 L. T. Rep. 207.)

*Q.*—In what cases will the court decree the specific performance of the sale or purchase of an estate when the price is agreed to be fixed by the arbitration of third persons ?

*A.*—If the price is to be fixed by the arbitration of third persons, the court cannot enforce specific performance of the contract till the price is actually fixed by such third persons ; and if they refuse to do so, the court cannot act : (see Lord St. Leonards' Handy Book, 43, 6th edit. ; Sug. V. & P. Conc. View, 203.) But if the arbitrators act with fairness and impartiality, and fix the price, then, the contract being complete, the court will decree specific performance thereof : (*ib.* ; Story's Eq. Jur. §§ 1458, 1459.)

*Q.*—*A.*, being an attorney, agrees to sell his business as such attorney to *B.* ; is, or is not, this such an agreement as a court of equity will enforce ? And give the reason for your answer.

*A.*—This point has not yet been fully settled by the courts ; it was, however, decided in the case of *Bunn v. Guy* (4 East, 190) that the sale of an attorney's business was *valid* where the contract was attended with partial restrictions on the practice of the vendor, such as not practising within a certain distance, &c. In the case of *Bozen v. Farlow* (1 Meriv. 459), specific performance of an agreement to purchase the business of an attorney was refused at the instance of the vendor ; there being no express stipulation by which the court might be enabled to carry it into effect on his part, in return for the defendant's purchase-money. And, from what was said by Sir W. Grant in delivering judgment in the above suit, it would seem a specific performance will not be decreed in such cases : (see Goldsmith's Eq. Pr. 177 to 179, 4th edit., where the judgment is given.)

*Q.*—In a suit for specific performance of a contract for the sale of an estate, is it competent to either the vendor or the purchaser to obtain a reference as to the title, or can this be done by one only, and which, of such contracting parties ?

*A.*—In a suit for specific performance either party may have a reference as to the title, but usually the purchaser obtains it : (2 Dan. Ch. Pract. 980, 981, 2nd edit. ; Sug. V. & P. Conc. View, 251.)

*Q.*—In a suit for specific performance of an agreement, is the plaintiff bound by the title as shown by him at the time of filing his bill ?

*A.*—No ; the vendor has the opportunity of making out a better title upon the inquiry ; and if he can show a good title at any time before the certificate, it will entitle him to a decree ; and even after the certificate, if he can satisfy the court that he can make a good title by clearing up the objections certified, the court will make a decree in his favour : (*Ayck. Ch. Pr.* 195.)

*Q.*—State the essential ingredients in contracts or agreements which are required in order to obtain a specific performance in a court of equity ?

*A.*—The contract must be between parties able and willing to contract ; and for a valuable consideration. The contract must be in writing, and the terms clear and definite, and such as the law allows. But although the Statute of Frauds requires contracts to be in writing,

still a parol contract will be enforced in equity: 1. Where it is fully set forth in the bill, and is admitted by the answer of the defendant, and he does not insist on the statute as a bar. 2. Where it was prevented from being reduced into writing by the fraud of one of the parties. 3. Where the agreement has been partly carried into effect, and it is shown by satisfactory evidence to be clear, definite and unequivocal in all its terms. The acts which constitute the part performance must have been done with no other intention than to perform the agreement, and exclusively referable to a complete agreement: (see *Smith's Man. Eq. tit. 2, ch. 8, 5th edit.*; and see *ante*, p. 187, 250.)

Q.—A. writes a letter to B. in these terms: "I am willing to sell you my freehold house in Piccadilly for 5,000*l*." B. replies by letter to A., in these terms: "I accept the offer contained in your letter." Do these letters by themselves constitute an agreement, the specific performance of which can be enforced in equity by either party?

A.—This is such an agreement as a court of equity will enforce; the terms of the agreement, the consideration and the subject-matter of the contract being all stated in A.'s letter, and accepted by B.: (see *Goldsmith's Eq. Pr. 172, 4th edit.*; *Sug. V. & P. Conc. View, 89*; *1 Hughes' Pract. Sales, 94, 2nd edit.*)

Q.—By what course of proceeding is A.'s remedy in equity to be enforced, according to the present practice?

A.—A. may now either file a bill ~~or claim~~ in the Court of Chancery for specific performance of the contract: (see *1st Order, 22nd April 1850*; *Ayck. New Ch. Pr. 405.*)

Q.—Your client buys an estate; on the investigation of the title it appears that the vendor cannot make a good title to a small field detached from the rest of the property, and not of any material consequence to your client, who however wishes to be off his bargain; will a court of equity compel him to fulfil his contract, and upon what terms?

A.—If, on the purchase of an estate, it turns out that the vendor cannot make a good title to a small field detached from the rest of the property, and not of any material consequence to the purchaser, the court of equity will, in such a case, decree a specific performance against the purchaser on a bill being filed for the purpose by the vendor, he making the purchaser compensation for the field. The question in such cases always is, "whether the part to which a title cannot be made is material to the possession and enjoyment of the rest of the estate:" (see *Hughes' Pract. Conv. 140, 141, and the cases there cited*; *Sug V. & P. Conc. View, 221, 225.*)

Q.—On the offer of the late East Indian loan, A. tendered, in writing, to take 100,000*l*. at 102 per cent., and the company, in writing, accepted the tender, but A. refused to complete the bargain: will a court of equity enforce the fulfilment of the contract? State the reason for your answer.

A.—A court of equity would not enforce the specific performance of this contract against A., because damages would amount to a compensation: (*Story's Eq. Jur. §§ 717, 718*; *Smith's Man. Eq. 187, 5th edit.*; *Sug. V. & P. Conc. View, 149.*)

Q.—Will a court of equity decree the specific performance of a covenant to invest money in lands, and to settle them in a particular manner?

A.—A court of equity will decree the specific performance of a

covenant to invest money in lands and settle them in a particular manner, at all events, where there is a valuable consideration for the covenant: (See Sug. V. & P. Conc. View, 561.) And, if a man covenants to purchase and settle lands, and afterwards accordingly purchases lands of equal or greater value, they will be held to have been purchased with an intent to perform the covenant, and will accordingly go in performance of it: (see *ib.*)

Q.—How far is the maxim of *caveat emptor* carried by the courts for specific performance? Does it warrant misrepresentation or artifice in a vendor to procure a contract? State the principles upon which the courts proceed. — *In the absence of warranty or caveat active*

A.—In cases for specific performance the maxim *caveat emptor* applies if the defects in the estate be patent; if there be no fraud and no concealment, and no artifice to disguise the thing sold, the purchaser can have no relief. Thus, where a meadow was sold to the owner of a house and ground adjoining without any notice of a footway round it, and also one across it, which of course lessened its value, a specific performance was decreed with costs, as the purchaser *did not choose to inquire*. It was not a latent defect; had he used ordinary caution he would have discovered the easement. And expressions, though untrue, if the facts might be ascertained by the purchaser by inquiry, will be no bar to a specific performance; as where land was described to be uncommonly rich water-meadow, specific performance was decreed, although it turned out to be imperfectly watered: (see Sug. V. & P. Conc. View, 288, &c.; Smith's Man. Eq. 54, 5th edit.) Misrepresentation will not be relieved against, unless it misleads the purchaser: (Story's Eq. Jur. § 202; Smith's Man. Eq. 54, 5th edit.) But if there is any artifice, &c. to disguise the thing sold, or some warranty as to its quality, &c., then specific performance will not be decreed: (Story, § 212; Smith, *sup.*)

Q.—A., supposes he has a right to enter into a written agreement for sale of an estate to B., which estate belongs to C.; will B., in a suit for specific performance against A. and C., be entitled to a decree?

A.—B. will not be entitled to a decree for specific performance against A. and C. (Story's Eq. Jur. § 1048, note), unless C. knew of the sale, and did not forbid it, and thereby B. was induced to become the purchaser under the supposition that the title was good: (*ib.* § 385.)

Q.—Are there any circumstances under which an agreement for a lease for twenty-one years, not made in writing, would be enforced by a court of equity? If so, state those circumstances, and the grounds on which such equity would prevail.

A.—Yes: 1. Where the agreement is set out in the bill, and is admitted by the answer of the defendant, and he does not set up the Statute of Frauds as a bar. 2. Where it has been prevented from being reduced into writing by the fraud of one of the parties. 3. Where there has been a part performance. The grounds on which a performance would be enforced by courts of equity in such cases are, that if the party allowing these acts to be done was not obliged to fulfil the agreement it would be permitting him to commit a fraud, the very crime the statute was designed to prevent: (Smith's Man. Eq. 205 to 207, 4th edit.; 1 Hughes' Pract. Sales Real Pro. 80, 81, 2nd edit.)

## COVENANT—FORFEITURE.

*Question.*—What is the difference between courts of equity and common law in their respective modes of considering the performance of covenants?

*Answer.*—At law (and in general the same is equally true in equity), if a man undertakes to do a thing by way of covenant, and it is practicable to be done, he is bound to perform it punctiliously, or suffer the consequences. And it is wholly immaterial whether the failure was occasioned by accident, or mistake, or fraud, or negligence. And, in general, there was no relief in such cases at law, but it must have been sought in equity; but relief may now be had in certain cases at law by the operation of various statutes. Courts of equity, however, do not hold themselves bound by such rigid rules as courts of law; they are accustomed to administer as well as refuse relief in cases of this sort upon principles peculiar to themselves; sometimes, following out the strict doctrines of the common law, refusing relief; and sometimes granting it upon doctrines wholly at variance with those held at common law: (see Story's Eq. Jur. §§ 1301 to 1303, 1311, *et seq.*; Smith's Man. Eq. 299, 5th edit.)

*Q.*—What is the general rule of equity in granting relief against penalties and forfeitures for breaches of covenant?

*A.*—Wherever a penalty or forfeiture appears to have been inserted merely to secure the performance of some act, or the enjoyment of some right or benefit, equity regards the performance of such act, or the enjoyment of such right or benefit, as the substantial object of the party interested therein; and if a compensation can be made for the non-performance or want of enjoyment thereof, it will relieve against the penalty or forfeiture, by decreeing a compensation in lieu of the same, proportionate to the damage sustained: (Story's Eq. Jur. §§ 1314, 1320; Smith's Man. Eq. 299, 301, 5th edit.)

*Q.*—Will a court of equity interfere in all, or what, cases of breach of covenant in a lease?

*A.*—In the case of breach of a covenant in a lease to pay rent, equity will relieve; but formerly no relief would have been granted in equity in case of a forfeiture for breach of any covenant other than a covenant to pay rent, unless on the ground of accident, mistake, or fraud: (Story's Eq. Jur. §§ 1315, 1320 to 1326; Adams on Equity, 109; Smith's Man. Eq. 301, 5th edit.) But see 22 & 23 Vict. c. 35, s. 4, *et infra*.

*Q.*—If a lessee, holding premises under a lease containing a covenant by him to insure the premises, with the usual clauses of forfeiture, should omit to effect a continuance of the insurance, and an ejectment be brought in consequence of such breach of covenant, will a court of equity in any, and, if so, in what, manner interfere to restrain the proceedings by ejectment?

*A.*—In case of a forfeiture for breach of covenant to insure by a lessee, equity would not formerly interfere to restrain the proceedings by ejectment: (see Story's Eq. Jur. § 1324; Smith's Man. Eq. 301, 5th edit.) But now equity may relieve against a forfeiture for breach of a covenant to insure if no loss by fire has happened, and the premises are,

at the time of the application, insured. This relief can only be granted once in respect of the same covenant or condition: (22 & 23 Vict, c. 35, ss. 4 to 6, and see more fully, *ante*, p. 151.)

## POINTS RELATING TO MORTGAGES.

*Question.*—Describe the nature and object of a bill of foreclosure.

*Answer.*—A bill of foreclosure is an original bill, filed by a mortgagee, (where the deed contains no power of sale, for the purposes of obtaining the direction of the court for payment of his principal money and interest; or, in default, that the mortgagor may be foreclosed from his equity of redemption: (Ayck. Ch. Pr. 196.)

*Q.*—What relief does a court of equity give where a mortgagee wishes to acquire an absolute title to a forfeited mortgage, and to foreclose all equity of redemption?

*A.*—The relief given to the mortgagee is, permitting him to foreclose the equity of redemption, unless the mortgage money, together with interest and costs, be paid within the time given, or by decreeing a sale. On the other hand, it allows the mortgagor to redeem the mortgaged premises if he applies to do so before the right is lost by the lapse of twenty years, during which period no acknowledgment has been made by the mortgagee of the mortgagor's title or right of redemption, and within the time allowed by the court for payment. And, on payment of the mortgage money and interest, equity will compel the mortgagee to reconvey the estate, and account for every kind of profit he has made in the ordinary way, or which, but for his wilful default, he might have made, although the mortgagor's estate is forfeited at law: (Story's Eq. Jur. §§ 1013, 1016, 1028 a; Smith's Man. Eq. 252, 253, 5th edit.)

*Q.*—Can a mortgagee proceed against the mortgagor both at law and in equity at the same time, and how?

*A.*—The court will not prevent the mortgagee from using all the remedies belonging to the character of mortgagee, and exercising all the powers that are given to him, as and when he pleases, even concurrently. If a debt is secured by the mortgage of a real estate, and also by covenant, and collaterally by bond, the mortgagee may pursue all his remedies at the same time; he may, at the same time, bring his ejectment, file his bill of foreclosure, and sue on the bond or covenant: (see Smith's Man. Eq. Jur. 256, 5th edit.; Coote on Mortgages, 497, 3rd edit.; Ayck. Ch. Pr. 259.)

*Q.*—Under the usual decree for foreclosure, is any, and what, time of payment allowed?

*A.*—Yes; the usual time of payment allowed is six months after the date of the certificate of the chief clerk. But, upon a fit case being made out, the court will enlarge the time appointed for payment of principal, interest and costs: (see Ayck. New Ch. Pr. 198.)

*Q.*—When a second mortgagee files a bill for foreclosure, how is the first mortgagee to be dealt with?

A.—A reference to take an account of principal and interest, and to tax costs due to the first mortgagee, is directed by the decree, and six months after the date of the chief clerk's certificate is given to the plaintiff to redeem the first mortgage; and in default of his so doing, the bill is dismissed. As to directing a sale instead of a foreclosure, see 15 & 16 Vict. c. 86, s. 48, and *post*, p. 258.

Q.—What is the nature and object of a bill of redemption?

A.—It is a bill brought by a mortgagor to get back his estate on payment of principal, interest and costs: (see Story's Eq. Jur. § 1013, *et supra*.)

Q.—What relief does a court of equity give where a mortgagor is desirous of redeeming a forfeited mortgage?

A.—It allows the mortgagor to redeem the mortgaged estate, and compels the mortgagee to reconvey, on payment of principal, interest and costs by the mortgagor: (see more fully *ante*.)

Q.—What responsibility does the mortgagee incur by entering into the possession of lands mortgaged to him?

A.—He is liable to the mortgagor for the rents and profits he has made in the ordinary way, or which, but for his wilful default, he might have made. So, if he assigns over his mortgage without the assent of the mortgagor, he is still bound to answer for the profits to the mortgagor, both before and after the assignment, though assigned only for his own debt. He must also keep the premises in necessary repair: (see Smith's Man. Eq. Jur. 261, *et seq.* 5th edit.; Coote on Mortgages, 303, 3rd edit.)

Q.—Where a mortgagee is in possession, what is the time limited within which a mortgagor may file a bill to redeem?

A.—When a mortgagee has obtained possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless, in the mean time, an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee, or the person claiming through him: (see 3 & 4 Will. 4, c. 27, s. 28; Sug. Real Pro. Stats. 109, 110; Browell's Real Pro. Stats. 46.)

Q.—By what means may a subsequent incumbrancer of a chose in action obtain priority over a previous incumbrancer?

A.—By giving notice to the debtor when the prior incumbrancer has omitted to do so: (see Story's Eq. Jur. §§ 1035 a, and note, 1047; Sug. V. & P. Conc. View, 275.)

Q.—In what respect does an equitable differ from a legal mortgage; and are there any, and what, proceedings provided by a court of equity for converting the equitable into a legal mortgage?

A.—A legal mortgage passes the entire legal interest in the subject-matter to the mortgagee and the mortgagor has but an equity of redemption; whilst an equitable mortgage merely gives the mortgagee a right in equity to have a complete title. A court of equity will compel the equitable mortgagor to grant a legal mortgage, or will proceed as on the footing of a legal mortgage: (see 27 L. T. 35; Burton's Comp. pl. 1574, n.)



**Q.**—In what respect is the relief given by a court of equity to an equitable mortgagee more extensive and beneficial than in the case of a legal mortgage?

**A.**—Besides having the usual decree for foreclosure, an equitable mortgagee may also, after the mortgagor's death, have a decree for sale, and go against the general assets for deficiency; and, it seems, he may have a decree for sale even in the mortgagor's lifetime: (Burton's Comp. pl. 1574 n.; 27 L. T. 35.) In the case of a legal mortgage, if there is no power of sale in the mortgage deed, in general a decree for foreclosure can only be made: (Story's Eq. Jur. § 1026.) At all events this was the rule formerly, but by the 15 & 16 Vict. c. 86, s. 84, a Court of Chancery may now direct a sale instead of a foreclosure in the case of a legal mortgage: (see Smith's Man. Eq. 253, 5th edit. *et infra*.)

**Q.**—A mortgagee has called in the mortgage money, which the mortgagor is unable to pay, but a third party is willing to advance it upon a transfer of the mortgage. Is the mortgagee bound to transfer the mortgage, and what course must be pursued if he refuses?

**A.**—It seems that, *stricto jure*, a mortgagee cannot be compelled to assign the mortgage debt on redemption either by the mortgagor or by a stranger, though he is bound to convey the estate: (Coote on Mortgages, 347, 3rd edit.) But if the proviso for redemption and reconveyance in the mortgage deed is properly worded, the mortgagee may be compelled to convey the mortgaged property to the new mortgagee by direction of the mortgagor on payment of his principal and interest.

**Q.**—A mortgagee after foreclosure sold the mortgaged estate, but it did not produce enough to pay the principal, interest and costs due, and he sued at law for the residue upon the mortgage bond; will a court of equity interfere to stop him? What would have been the case if the mortgagee had not sold the estate after foreclosure, but had sued for an alleged deficiency on the bond; would the foreclosure be opened, or not, in equity?

**A.**—In the first case put, the mortgagee cannot, after selling the foreclosed estate, sue on the bond for any deficiency that may arise, and equity will stop him; and even if he does not sell the estate after the foreclosure, but sues on his bond or covenant, this will have the effect of opening the foreclosure, and giving to the mortgagor the right to redeem again: (see Smith's Man. Eq. Jur. 257, 5th edit.)

**Q.**—In what cases is notice essential to give effect to equitable mortgages?

**A.**—Notice is essential in mortgages of equitable interest in personal property (see Story's Eq. Jur. § 421 a. 1035 a. and note); also, in all assignments of choses in action: (*ib.* 1047; Sug. V. & P. Conc. View, 275.)

**Q.**—State the general purposes for which a mortgagee in possession may expend money upon the mortgaged estate which will be allowed to him by a court of equity in taking the account between the mortgagor and mortgagee?

**A.**—A mortgagee in possession will be allowed all his fair expenses in renewing leases, necessary repairs, lasting improvements (Coote on Mortgages, 536, 3rd edit.), and protecting the title to the property (Story's Eq. Jur. § 1016 b); he will not be allowed his expenses in opening mines or quarries, but must speculate at his own hazard (Coote on Mortgages, *ubi sup.*); and he will not be allowed for general improve-

ments made without the consent of the mortgagor : (*ib.* ; Story's Eq. Jur. § 1016 b. ; Smith's Man. Eq. 263, 5th edit.)

**Q.**—A. lends money to B. on a deposit of title-deeds and an agreement to execute a mortgage with power of sale ; B. fails to pay the money or to execute the mortgage, and A. wishes to sell the property : can he sell under the power before the mortgage has been executed ?

**A.**—If A. lends money to B. on a deposit of title-deeds and an agreement to execute a mortgage with powers of sale, and B. fails to pay the money or to execute the mortgage, A. cannot before the mortgage is executed proceed to sell the property, but he may go into equity, and the court will either compel B. to execute a legal mortgage with a power of sale, or will proceed as on the footing of a legal mortgage, and decree a sale : (see 27 L. T. 35.)

**Q.**—In the power of sale in a mortgage deed of real estate it is declared that the mortgagee shall hold the surplus of the moneys arising from the sale in trust for the mortgagor, his "executors, administrators, or assigns." After the sale under such power, is the surplus to be considered real or personal estate, and does it make any difference whether such sale takes place in the lifetime of the mortgagor, or after his death ?

**A.**—If in a power of sale in a mortgage deed of real estate it is declared that the mortgagee shall hold the surplus of the moneys arising from the sale in trust for the mortgagor, his "executors, administrators, or assigns," and a sale is effected under the power, the surplus would, if the mortgagor was living, be personal estate. But if the sale took place after the mortgagor's death, then, as a mortgage is only considered in equity as a security for money, and not as an absolute conveyance, the estate would descend to the heir of the mortgagor, and the surplus after the estate was sold would still be real estate, and if paid to the executors, &c. of the mortgagor, they would be trustees for the mortgagor's heir-at-law : (see Smith's Man. Eq. 255, 256, 5th edit.)

**Q.**—Can a court of equity, in a foreclosure suit, direct a sale of the mortgaged estates ?

**A.**—Yes ; for, by the 15 & 16 Vict. c. 86, the court is empowered, upon the request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, to direct a sale instead of a foreclosure, on such terms as the court shall direct ; and, if the court shall think fit, without previously determining the priorities of incumbrances or giving the usual or any time to redeem. But if such request be made by any subsequent incumbrancer, or by the mortgagor, or any person claiming under them respectively, the court will not direct a sale without the consent of the mortgagee or the person claiming under him, unless the party making such request shall deposit a reasonable sum of money, to be fixed by the court, for the purpose of securing the performance of such terms as the court may think fit to impose on the party making such request : (sect. 48 ; Smith's Man. Eq. 263, 5th edit. ; and see hereon *Whitbread v. Roberts*, 33 L. T. Rep. 24.)

**Q.**—In case a testator dies possessed of real estates subject to mortgages, and he bequeaths his real estate to one person and his personal estate to other persons, without any direction as to the payment of his debts, out of which estate are the mortgages to be paid. (*a*)

(*a*) Also asked in this form: A. devises his real estate to B., and his personal estate to C ; the real estate is subject to a mortgage debt, and either estate is sufficient for the payment of it. As between B. and C. which is liable to the debt? And state any special circumstances which may govern your answer.

A.—By the 17 & 18 Vict. c. 113, it is expressly enacted, that where a person shall, after the 31st Dec. 1854, die seised of or entitled to any estate or interest in lands or hereditaments, and the same shall at his death be charged with the payment of any money on mortgage, and he shall not, by his will or deed, or any other document, have signified any contrary intention, the heir or devisee to whom such lands, &c. shall descend or be devised, shall not be entitled to have the mortgage money discharged out of the personal estate. But it is provided that the enactment shall not affect any rights claimed under any deed, will, or other document made before the 1st Jan. 1855.

## PARTITION.

*Question.*—What relief does a court of equity give where a joint tenant, or a tenant in common, is desirous of having the joint property divided?

*Answer.*—The mode in which relief is administered in equity in such cases, is by first ascertaining the rights of the several parties interested, and then issuing a commission to make the partition; and on the return of the commission, and confirmation of the return by the court, the partition is finally completed by mutual conveyances of the lots made to the several parties: (Story's Eq. Jur. § 650; Smith's Man. Eq. 317, *et seq.* 5th edit.)

## ACCOUNT.

*Question.*—State some of the cases in which a bill in equity for an account will lie.

*Answer.*—A bill in equity for an account will lie between trustee and *cestui que trust*; in partnership transactions; by principals against their factors and agents, and by mortgagors against mortgagees who have been in possession, and *vice versâ*: (Goldsmith's Eq. Pr. 82, *et seq.* 4th edit.)

Q.—In a suit for an account, is it competent for the court to direct that the books, in which the accounts required to be taken have been kept, shall to any, and to what, extent be deemed evidence of the truth of the matters therein contained?

A.—By the 15 & 16 Vict. c. 86, it is enacted, that it shall be lawful for the court, in cases where it shall think fit so to do, to direct that in taking the account, the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty

to the parties interested to take such objections thereto as they may be advised : (s. 54 ; Hallilay's Ch. Suit, 75 ; Smith's Ch. Pr. 5th edit.)

*Q.*—If an account be settled between parties, and signed, will a court of equity open the account generally or partially; and, if so, upon what principle ?

*A.*—Generally, where an account has been settled, it is deemed conclusive between the parties, unless some fraud, mistake, omission, or inaccuracy be shown. And the court will not generally open the account, but will, at most, only grant liberty to surcharge and falsify, unless in cases of apparent fraud : (Story's Eq. Jur. § 527.)

*Q.*—Is there any, and what, advantage in the proceedings of a court of equity over those of a court of common law in questions of account ?

*A.*—The proceedings in the action of account being difficult, dilatory, and expensive, it is now seldom used, especially if the demand be of consequence, and the matter of an intricate nature ; for in such cases it is more advisable to resort to a court of equity, where matters of account are more commodiously adjusted, and determined more advantageously for both parties : (Story's Eq. Jur. § 443 ; Smith's Man. Eq. tit. 3 ch. 1.)

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### CY PRÈS.

*Question.*—Explain what is meant by the rule or doctrine maintained by a court of equity, and which is commonly termed *cy près*.

*Answer.*—Where a literal compliance with the directions of a testator becomes inexpedient or impracticable, the court will execute them as nearly as it can according to the original purposes, or (as the technical expression is) *cy près* : (Story's Eq. Jur. §§ 291, 1169.)

*Q.*—Where there is a devise for charitable purposes, but the special mode of application is impracticable, will the court carry the devise into effect in any, and what, manner ?

*A.*—If in a bequest to a charity a literal execution becomes impracticable or inexpedient, the court will execute it as nearly as it can according to the original purpose, or (as it is technically expressed) *cy près* : (Story's Eq. Jur. §§ 1169 to 1172.)

## INFANTS.

*Question.*—What protection does a court of equity give to infants having property within the jurisdiction ?

*Answer.*—The Court of Chancery will appoint a suitable guardian to an infant where there is no other who will or can act, at least where the infant has property. If the infant has no property, the court, perhaps, will not interfere; not from a want of jurisdiction, but because it cannot exercise its jurisdiction usefully without having the means of applying property for the benefit of the infant. The court will also remove or assist guardians on sufficient cause, and control their conduct. The court will also deprive the parent of the custody of his children on proof of gross ill-treatment, or that the parent is living in gross immorality, or avowed impiety, or otherwise acts in a manner injurious to the morals or interest of his children. The court will also prevent the estate of the infant from being wasted : (see Story's Eq. Jur. § 1338, *et seq.* ; Goldsmith's Eq. Pr. 147, *et seq.* 4th edit. ; Smith's Man. Eq. 357, 5th edit.)

*Q.*—What is the course of proceeding if, upon default made by a defendant in not appearing to or not answering a bill, it appears to the court that the defendant is an infant ?

*A.*—In such case the court may, upon the application of the plaintiff, order that the solicitor to the ~~suit~~ fund be assigned guardian of such infant defendant, by whom he may appear to and answer, or may answer the bill and defend the suit. It must be shown that a copy of the bill was duly served, and that notice of such application was, after the expiration of the time allowed for appearing to or for answering the bill, and at least six clear days before the hearing of the application, served upon or left at the dwelling-house of the person with whom, or under whose care, such defendant was at the time of serving the bill, and also upon the father or guardian of the infant, unless dispensed with by the court : (Ayck. Ch. Pr. 41 ; Smith's Ch. Pr. 118, 142, 5th edit.)

*Q.*—What notice is necessary before moving to assign a guardian to an infant defendant ?

*A.*—See preceding answer.

*Q.*—Can a father or mother appoint a guardian to their children ?

*A.*—The 12 Car. 2, c. 24, gives the father power to dispose of, by testamentary disposition, (a) the guardianship of his children, which may extend, if males, to the age of twenty-one years ; if females, to that age or marriage, whichever may first happen. A mother cannot appoint a testamentary guardian, although she may be appointed guardian : (Goldsmith's Eq. Pr. 151, 4th edit. ; Will. Real Pro. 100, 101, 4th edit.)

*Q.*—What is necessary to be done to obtain an order for the appointment of a guardian and maintenance of an infant ? (b)

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(a) The statute says by "deed or will," but this has been held to mean a testamentary instrument in the form of a deed or will : (see Chit. Stats. by Welsby and Bevan, 571, n. d. 2d edit.)

(b) Also asked thus: In the absence of a guardian so appointed, what is the summary course of proceeding after the father's death for the appointment of a guardian, and procuring an allowance for the infant's maintenance?

*A.*—All applications relating to the guardianship and maintenance of infants may be made at chambers, except for the appointment of a guardian *ad litem*: (see Judges' Reg. 10th Nov. 1850.) Evidence must be produced to show: 1st, the age of the infant; 2ndly, the nature and amount of the infant's fortune and income; and 3rdly, what relations the infant has: (see Judges' Reg. Aug. 1857.) It must also be shown that the guardian is a fit and proper person, and that he has no interests opposed to those of the infant. This is not in substitution for the mode of proceeding to obtain a guardian when a defendant does not appear, being an infant, detailed above.

*Q.*—Can a valid settlement of the real and personal estates of infants be made upon their marriage? And, if so, how?

*A.*—It is now provided by the 18 Vict. c. 43, that infants may, with the approbation of the Court of Chancery, make valid and binding settlements, or contracts for settlements, of their real or personal estate on their marriage. But it is provided that the act shall not extend to male infants under twenty years of age, or to female infants under seventeen years of age. Formerly, a special act of Parliament was required to bind the real estate of an infant: (see Fonb. Eq. 81, n.)

*Q.*—In the case of an infant entitled to a fund in court, and having a father living, what are the circumstances under which the court will order an allowance out of the income of the fund for the maintenance of the infant?

*A.*—It seems it is not now necessary (as formerly) to show that the father is in distressed circumstances before he can claim an allowance out of the infant's property; for if he is not of ability to maintain the infant according to his expectations, he may claim a suitable allowance for him during his minority. But in such a case the court usually directed a reference to the Master to inquire as to the father's ability to maintain the infant: (Ayck. New Ch. Pr. 456; and see Smith's Man. Eq. 362, 5th edit.)

*Q.*—Upon the marriage of an infant minor, without the consent of the court, what is the consequence to persons concerned in, assisting, or procuring such marriage; and what course does the court usually adopt towards them?

*A.*—If a man should marry an infant ward of Chancery without the consent of the court, even though with the consent of the guardian, he, and all others concerned in aiding and abetting the act, are guilty of a contempt of court; even though ignorant that she was a ward of court, they will be deemed guilty of a high contempt (see Story's Eq. Jur. § 1358; Smith's Man. Eq. 363, 5th edit.); and may be punished by attachment.

*Q.*—What rules do courts of equity observe regarding the enforcement of contracts entered into by infants?

*A.*—A court of equity will not enforce the specific performance of contracts entered into by infants, either for or against them; for to enforce the specific performance of agreements the remedy must be mutual: (see Goldsmith's Eq. Pr. 180, 4th edit.; Story's Eq. Jur. § 787; Smith's Man. Eq. 192, 5th edit.)

*Q.*—Can or cannot a bill be filed on behalf of an infant without his consent?

*A.*—Any one may institute a suit on behalf of an infant without his consent: (Mit. Pl. 28; Danl. Ch. Pr. 95.) But now the 11th section of

the 15 & 16 Vict. c. 86, puts some restraint on persons filing bills on behalf of infants without their consent, by enacting that before the name of any person shall be used in any suit to be instituted in the Court of Chancery as next friend of any infant, such person shall sign a written authority to the solicitor for that purpose, and such authority shall be filed with the bill, &c. : (see Supplement to Goldsmith's Eq. Pr. 18, 4th edit.) And the court has the power to stay or dismiss proceedings which appear to be detrimental to the interest of the infant : (see Smith's Ch. Pr. 80, 5th edit.)

*Q.*—How does an infant institute a suit in equity, and how defend it ?

*A.*—If an infant is desirous of instituting proceedings, he must do so in the name of an adult, who, in such case, is called his *prochein ami*, or next friend. As above seen, the next friend must sign a written authority to the solicitor to be filed with the bill. If a bill be filed against an infant, he cannot defend the suit until a guardian *ad litem* has been appointed him for that purpose, which must be done in open court on petition : (see Ayck. Ch. Pr. 453, 454; Smith's Ch. Pr. 79, 168, 5th edit.)

*Q.*—If a suit be instituted on behalf of an infant, which is considered to be injurious to his interests, in what way will the court, on representation to that effect being made, proceed in order to ascertain whether it be well or ill founded; and, if the latter, what course will it adopt ?

*A.*—In such case the court will direct a reference to chambers to ascertain if the suit is for the infant's benefit; and, if not, will stay the proceedings or order the bill to be taken off the file: (Danl. Ch. Pr. 95; Ayck. Ch. Pr. 263; Hallilay's Ch. Suit, 83; Smith's Ch. Pr. 80, 81, 5th edit.)

*Q.*—In what manner is the answer of an infant put in ?

*A.*—An infant answers by guardian : (Ayck. Ch. Pr. 80, 454; Hallilay's Ch. Suit, 23; Smith's Ch. Pr. 168, 5th edit.)

*Q.*—Can admissions be made on behalf of an infant who is a party to a suit ?

*A.*—No; an infant cannot admit anything : (Ayck. Ch. Pr. 116, 122; Hallilay's Ch. Suit, 45; Smith's Ch. Pr. 214, 5th edit.)

*Q.*—Is the decree of a court of equity binding in any, and if any, in what cases, on a party to the suit who is a minor ?

*A.*—With respect to a decree binding an infant, there is a difference whether he stands in the condition of a plaintiff or defendant in a suit. If a plaintiff, he is equally bound by the decree as a person of full age; but where he is defendant in a cause, he is not conclusively bound by the decree of a court of equity, but has a day given to show cause against the decree, usually limited to six months after he has attained the age of twenty-one years : (*Gregory v. Molesworth*, 3 Atk. 625; Smith's Ch. Pr. 262, 5th edit.; Goldsmith's Eq. Pr. 359, 360, 4th edit.) When there has been a decree in a foreclosure suit against several defendants, one of whom is an infant, he has a day to show cause against the decree; but if the court has decreed a sale, that binds the infant. And it seems that if any suit is instituted for payment of debts of a deceased person, under the 1 Will. 4, c. 47, s. 11, to which his heirs or devisees may be liable, and the estates are directed to be sold for satisfaction of such debts, and the heir or devisee is an infant, he will nevertheless be bound to convey: (see Goldsmith's Eq. Pr. 359, 360, 4th edit.; Ayck. Ch. Pr. 161, 162,

4th edit. ; see also 13 & 14 Vict. c. 60 ; but see Smith's Ch. Pr. 262, 5th edit., and the cases there referred to.)

Q.—How must a plaintiff proceed to make a decree binding upon an infant ?

A.—Upon the infant coming of age, he should be served with a subpoena to show cause ; and, if he make default, the decree is made absolute against him : (Ayck. New Ch. Pr. 161 ; Smith's Ch. Pr. 263, 264, 5th edit.) If the late infant be desirous of being heard, he presents a petition as of course that the cause may be set down in order that he may show cause against the decree : (Smith, *sup.*)

Q.—Who is liable for the costs incurred by an infant plaintiff ?

A.—His *prochein ami*, or next friend, is liable for costs ; but if the infant continues the suit after he is twenty-one, he makes himself liable for the whole costs : (Goldsmith's Eq. Pr. 387, 4th edit. ; Smith's Ch. Pr. 80, 5th edit.)

Q.—Can the *prochein ami* of an infant sue *in formâ pauperis*, or can any objection be sustained to such *prochein ami* on the ground of his poverty ?

A.—An infant, it seems, may sue *in formâ pauperis* by his next friend, and objections to the next friend of an infant cannot be made on account of his poverty : (Danl. Ch. Pr. 103, 152 ; *Davenport v. Davenport*, 1 Sim. & S. 101 ; Smith's Ch. Pr. 79, 509, 5th edit.)

Q.—When the next friend of an infant plaintiff dies, and there is delay in appointing a new next friend, what is the proper course of proceeding by the defendant ?

A.—The proper course for the defendant to adopt in such a case is to obtain an order that the court may approve of a new next friend ; and four days' notice of the order must be given to the plaintiff's solicitor : (Ayck. New Ch. Pr. 454.)

Q.—If there be a decree for the sale of estates to pay debts, and such estates by descent or devise be vested in an infant, how is such sale to be perfected, and under what authority ?

A.—By the 1 Will. 4, c. 47, the court is in such case empowered to compel the infant to convey the estates so decreed to be sold for payment of debts to the purchasers thereof, in such manner as the court may direct : (Ayck. Ch. Pr. 161, 162, 4th edit.) This power is further extended by the 13 & 14 Vict. c. 60, and the 15 & 16 Vict. c. 55, to which statutes the student is referred for further information.

## RIGHTS OF MARRIED WOMEN.

Question.—How and in what manner should proceedings in equity be instituted by a married woman ?

Answer.—A suit on behalf of the rights of a married woman is usually instituted by herself and her husband jointly. But if a married woman has interests in opposition to those claimed by her husband, she must sue by her next friend : (Goldsmith's Eq. Pr. 208, 4th edit.) But



before the name of any person shall be used in any suit to be instituted in the court as next friend of a married woman, such person shall sign a written authority to the solicitor for that purpose, and such authority shall be filed with the bill, information, ~~or claim~~: (15 & 16 Vict. c. 86, s. 11.)

*Q.*—Can a married woman, in any case, institute a suit as a *feme sole*?

*A.*—If her husband is banished, or has abjured the realm, a married woman may institute a suit as a *feme sole*: (Goldsmith's Eq. Pr. 207, 208, 4th edit.) So, if she has obtained an order protecting her earnings and property when deserted by her husband, under sect. 21 of the Divorce Act (20 & 21 Vict. c. 85), or has been judicially separated under the same act: (see Halliday's Articled Clerk's Handbook.)

*Q.*—What protection does a court of equity afford to a married woman in respect of property belonging to her, which the husband cannot reach without the aid of a court of equity?

*A.*—In such a case the court will not give it up to the husband without requiring him to make a suitable settlement on the wife of a part of the property, or of some other property, for her due maintenance, in case of her surviving him, with a provision for the issue of the marriage; unless the wife and children are already amply provided for under a prior settlement, or the right to a settlement is waived: (Story's Eq. Jur. §§ 1404, 1406, 1416, 1418; Smith's Man. 384, 5th edit.)

*Q.*—Are there any circumstances under which the rule referred to in the last question will be relaxed in favour of the husband? If so, give instances in which such rule will be so relaxed.

*A.*—Yes; as when the wife and children are already amply provided for under a prior settlement, or the right to a settlement is waived by the wife in open court; or under a commission; or lost by her own misconduct, as if she be living in adultery, apart from her husband; but in such a case a court of equity will not decree such equitable property to be paid over to the husband, on his application; for when the wife is living apart from him, he is at no charge for her maintenance, and it is only in respect to his duty to maintain her that the law gives him her fortune: (Story's Eq. Jur. §§ 1416 to 1419 a; Smith's Man. Eq. Jur. 390, *et seq.* 5th edit.) An exception also occurs where the wife's property is a term of years held in trust for her: (Story, § 1410.)

*Q.*—What amount of principal money, or of an annual payment, will the Court of Chancery pay to a married woman or her husband without order; and what evidence is required in support of the application?

*A.*—When the sum does not exceed 200*l.* in principal, or 10*l.* in annual payments, upon an affidavit of the wife and her husband, stating the marriage, and that no settlement, or agreement for a settlement, has been made whatever, the accountant-general of the court shall make the drafts for such principal sum, not exceeding 200*l.*, or for such annual payment, not exceeding 10*l.*, payable to such married woman or her husband. If the money exceeds the above amount, the wife presents a joint petition with her husband for payment thereof out of court, to such person, and in such manner, as she may desire.

A certificate of the marriage, verified by affidavit, will be necessary, and a certificate of the fund in court, and, as above stated, a joint affidavit by husband and wife that there is no settlement whatever: (see further, Ayck. Ch. Pr. 343, 344; but see hereon *Re Cutler*, 14 Beav. 220; Smith's Man. Eq. Jur. 382, 5th edit.)

**Q.**—Will a court of equity require any settlement in favour of a wife out of property bequeathed to her, and claimed by her husband ; and, if so, in what proportion to the amount of the legacy ?

**A.**—In such case equity will compel the husband to make a settlement upon the wife, and the proportion so settled is usually half of the legacy : (Smith's Man. Eq. Jur. 388, 5th edit. ; 1 Bright's H. & W. 241.)

**Q.**—If a legacy be given to a married woman, and the husband sue for it in the Ecclesiastical Court, will equity interfere to prevent the payment to him ; and, if so, upon what principle is such interference founded ?

**A.**—If a legacy be given to a married woman, and the husband had sued for it in the Ecclesiastical Court, a court of equity would have granted an injunction ; because the Ecclesiastical Court had no authority, like that of a court of equity, to require him to make a suitable settlement on her and her family (Story's Eq. Jur. § 598) ; but now the Ecclesiastical Courts are abolished by the statute 20 & 21 Vict. c. 77, which also enacts, "That no suits for legacies, or suits for the distribution of legacies, shall be entertained by the Court of Probate, or by any court or person whose jurisdiction as to causes and matters testamentary is abolished by this act : " (see sect. 23 ; Halliday's Articled Clerk's Handbook, 44.)

**Q.**—Will a court of equity enforce a trust for an unmarried woman so as to secure property for her from the control, disposition, or intermeddling of an after-taken husband or his creditors ?

**A.**—Yes ; for property may be secured to an unmarried woman, with a clause against anticipation ; and, in such a case, it will be good against the marital rights of any future husband or his creditors : (Story's Eq. Jur. §§ 1384, 1414, and see *ante*, pp. 193 to 196 ; Smith's Man. Eq. Jur. 374, 379, 5th edit.)

**Q.**—If property be given to the separate use of an unmarried woman, with a restraint against anticipation, will the separate use be enforced on her subsequent marriage ; and what will be the effect of the death of her subsequent husband on her separate use, and what the effect on it in case of her contracting a second marriage ?

**A.**—As above seen, if property be given to an unmarried woman for her separate use, it will be enforced on her subsequent marriage. The separate use clause, either with or without a restraint against anticipation, will be confined to the then existing, or the then intended, coverture, or will be also applied to other covertures, according to the apparent intention. If it appears to have been intended that every husband should be excluded, and the clause against anticipation operates during every successive coverture, in such case, although the woman while single, and when and as often as she becomes a widow, has the absolute dominion over the property, yet if she does not dispose of the property so as to put an end to the trust, and she marries again, the separate use clause, and the restraint against alienation, will be revived during such and every other subsequent coverture, so long as the property is held upon the original trust : (Smith's Man. Eq. Jur. 380, 5th edit. ; Burton's Comp. pl. 1391, and note, and see *ante*, pp. 193, 194.)

**Q.**—In what cases can a married woman be compelled to appear and defend a suit separately from her husband ?

**A.**—If the husband can satisfy the court that he is unable to prevail upon his wife to answer, the court will relieve him from his wife's con-

tumacy, and order that the wife answer separately. So, when the husband and wife are made defendants in right of the wife; also, when the husband and wife live separate; and when the husband is out of the jurisdiction, she may answer separately: (Ayck. Ch. Pr. 57, 80, 4th edit.)

Q.—When do the choses in action of the wife, who survives her husband, pass to the husband's executors?

A.—When he has reduced them into possession in her lifetime: (Allnut's Pract. Wills & Adms. 248, 3rd edit.)

Q.—Can a married woman bind herself by contract in equity, in any, and what, case?

A.—A married woman cannot bind her person in equity, but she may bind her separate estate. For a married woman having separate estate, being considered in equity as a *feme sole* with respect to the capacity of enjoying it, she is likewise considered as a *feme sole* with respect to her capacity of charging it with her separate engagements. But, as before stated, no personal decree can be made against her; the court can only affect separate estate in the hands of her trustees: (Story's Eq. Jur. §§ 1397, and note, 1400, and note; Smith's Man. Eq. Jur. 381, 5th edit.)

Q.—Can a married woman effectually assign or give security upon any property to which she will become entitled on the happening of a future event?

A.—If the property to which the wife will be entitled on the happening of the event be *real* property, she may either assign or give security upon such property. The disposition must be by deed, however, and the husband must join her in the deed, and it must be acknowledged by her, as required by the 3 & 4 Will. 4, c. 74: (see Browell's Real Pro. Stats. 125, 276, 277, *et ante*, pp. 194, 195.) If the property to which the wife is entitled be a reversionary equitable interest in personal property, or reversionary choses in action, she could not formerly (unless settled to her separate use), nor could she and her husband joining, effectually assign or give any security upon this description of property during the coverture; for, notwithstanding such disposition, it would still be subject to the wife's right of survivorship, and equity to a settlement: (see Story's Eq. Jur. §§ 1412, 1413.) And this is still the case as to this species of property, if it came to the wife by any deed or instrument executed before the 31st Dec. 1857. But if it comes to her by any deed or instrument executed after this date, then she may (unless expressly restrained from so doing, or unless it be settled upon her on marriage as a provision for marriage,) convey it by deed, properly executed, according to the provisions of the 3 & 4 Will. 4, c. 74: (see 20 & 21 Vict. c. 57; *et ante*, p. 195.)

Q.—At the time of marriage a wife is entitled to a beneficial lease for years, and she outlives her husband. Can the husband sell the lease during the coverture without her consent; and, if it is not sold, to whom will it belong on the death of the wife?

A.—If on her marriage a woman is entitled to a beneficial lease for years, the husband may during the coverture charge or dispose of it as he thinks fit, but he cannot dispose of it by will; and if the wife outlives the husband, and he has not disposed of it during the coverture, it will belong to the wife: (see Will. Real Pro. 336, 4th edit., and the authorities there cited.)

Q.—Is the wife a necessary party to a suit in equity for recovery of

property accruing to her after marriage, and is there any difference in the rules of law and equity in this respect ?

A.—The husband may sue alone for any matter relating to land which the husband has in right of his wife, for injury to personal property, and for all personal property coming to the wife, or to husband and wife jointly during marriage, and on all contracts entered into with her during that period; because the right of action accrued after the marriage: (see Arch. New C. L. Pract. 24, 25, 2nd edit.) In equity, however, as this distinction does not exist, it seems necessary in all cases where the property sought to be recovered is the property of the wife, that she should be a party with the husband, whether the right to the property accrued before or after marriage: (see generally Dan. Ch. Pr. 119, 120; 1 Smith's Ch. Pr. 100, 101, 2nd edit.; as to joining husband and wife in equity, see also *Clark v. Angier*, 2 Freem. 160; S. C. 1 Chan. Rep. 61.)

Q.—Where a legacy is given to a married woman, in what way may her husband recover it?

A.—If the legacy is a specific one, and the executor has assented thereto, the husband may recover at law. If the legacy is charged on land, and other courts cannot take due care of the interests of all parties, equity will assert an exclusive jurisdiction, and it must be sued for there: (Story's Eq. Jur. §§ 591, 592, 595, 598.) In fact, unless the legacy is specific, and the executor has assented, equity may now be said to have exclusive jurisdiction over legacies; for, as before shown, the Ecclesiastical Courts are abolished: (see 20 & 21 Vict. c. 77, *et ante*, p. 266.)

Q.—In cases where a married woman pleads, answers, or demurs separately from her husband, is any, and what, step necessary to enable her to do so?

A.—Yes; an order is necessary, which is obtained on notice to the wife when she refuses to answer, but in other cases it is obtained as of course: (Ayck. New Ch. Pr. 58, 80.)

Q.—If a bill be filed on behalf of a married woman against her husband without her consent, will this circumstance, on its being made out to the satisfaction of the court, involve any, and, if any, what consequences?

A.—Upon an affidavit made by the wife stating that she was not cognisant of the suit, and had not consented to it, the bill will be dismissed: (Dan. Ch. Pr. 404.)

Q.—Will a court of equity make any difference in its decision on an objection to the next friend of a married woman, on the ground of the next friend being in indigent circumstances; and if so, why?

A.—It is laid down, in several text books of authority, that the next friend of a married woman must be a man of substance, because he is liable for costs. A suit by a married woman is substantially her own suit, and her next friend is chosen by her; and, in this respect, there is a difference between a *feme covert* and an infant: (see Dan. Ch. Pr. 152, 1st edit. 120, 2nd edit.; 1 Smith's Ch. Pr. 103, 3rd edit.) But, in the case of *Dowden v. Hook* (8 Beav. 399), it was laid down that the next friend of a married woman, plaintiff, need not be a man of substance; and a motion made to stay proceedings until a new next friend was appointed, or security for costs given, on the ground that the next friend was out of employment and dependent on his mother for support, was dismissed. The case of *Dowden v. Hook* was followed by *Jones v. Fawcett*, 2 Phill. 278, and others. But, in a late case, the older doctrine has been sup-

ported, and it has been decided that the next friend of a married woman, plaintiff, must be a man of substance, and able to give security for costs : (*Hind v. Whitmore*, 27 L. T. Rep. 55.)

*Q.*—If a bill be filed by a man and his wife touching the personal property of the wife, and the husband dies pending the suit, does or does not that circumstance cause an abatement of the suit ?

*A.*—In this case, if the husband dies, the demand is considered in the nature of a chose in action of the wife, and survives to her, and the suit does not abate : (3 Ch. Rep. 40 ; 2 Freem. 133 ; Rede. Plead. 47.)

*Q.*—Where husband and wife are defendants to a suit, how does the death of the husband affect the suit ?

*A.*—There will be no abatement of the suit by the death of the husband, unless a new interest accrues to the wife : (see 1 Smith's Ch. Pr. 657, 3rd edit. ; 2 Vern. 249.)

*Q.*—If access to her infant children be refused to a mother by the father or guardian, will the court interfere to any, and what, extent ; and, if so, under what authority ?

*A.*—The Court of Chancery is empowered, upon the hearing of a petition of the mother of an infant, or infants, being in the sole custody or control of the father, or any person by his authority, or any guardian after his death, to make an order for the access of the petitioner to such infant, or infants, at such times, and in such manner, as the court shall think fit ; and if such infant, or infants, be within the age of seven years, may order them to be delivered up to, and remain in, the custody of the mother until such age, and subject to such regulations as may seem just. An exception, however, is made in case of the adultery of the mother, where a judgment has been obtained in an action at the suit of the husband, or by sentence of the Ecclesiastical (now Divorce) Court. This is under the authority of the 2 & 3 Vict. c. 54.

## LUNATICS.

*Question.*—What is the origin of the Lord Chancellor's jurisdiction in lunacy, and how derived ; and to what other judges has it recently been extended ?

*Answer.*—The Sovereign, as *parens patriæ*, had from the first the care of idiots and lunatics who had no other guardian. And a statute of Edw. 2, or some other earlier statute, besides giving him the custody of idiots, also vested in him the profits of their lands during their lives, and the King was made a trustee for them. Thus the Crown has both a general and specific authority ; and as the Chancellor is the person by whom the Crown exercises its powers, as keeper of the royal conscience and delegate of the Crown in this twofold capacity, the authority of the Chancellor is clearly derived from the Crown. By the stat. 14 & 15 Vict. c. 83, this jurisdiction is extended to the Lords Justices of the Court of Appeal : (sect. 5 ; and see Smith's Man. Eq. 366, 368, 5th edit.)

*Q.*—If a defendant, on his failing to appear or answer, should be proved to the court to be of unsound mind (not so found by inquisition),

what will the court do in such circumstances, and upon whose application ?

A.—Upon the application of the plaintiff in such a case, the court may order one of the solicitors <sup>of the court</sup> ~~to the suitors fund~~ to be assigned guardian of such defendant, by whom he may appear to and answer, or may answer the bill and defend the suit. It must be shown that a copy of the bill was duly served ; also, that notice of the application was served or left at the dwelling-house of the person with whom, or under whose care, such defendant was at the time of serving the bill, at least six days before the hearing of the application. The six days mentioned in the order must be six clear days ; but Sunday is reckoned as one of such days : (Ayck. Ch. Pr. 41, 4th edit.)

Q.—How can a plaintiff procure the appointment of a guardian for a person of unsound mind ?

A.—As already seen, if the lunatic is not so found by inquisition, the court will, on the application of the plaintiff, order one of the solicitors of the court to be guardian. But if he has a committee, the court will appoint the committee to be guardian *ad litem*, unless his interests are adverse to those of the lunatic : (Goldsmith's Eq. Pr. 210, 4th edit.)

Q.—In what cases will courts of equity interfere to carry into effect the contracts of lunatics ?

A.—If, from the nature of the contract, there is not entire good faith, or it is not seen to be just in itself, or for the benefit of the lunatic (or idiot), courts of equity will set the contract aside or make it subservient to their just rights. But where there is entire good faith, and the contract is for the benefit of such persons, as to provide them with necessities, then courts of equity will uphold it : (Story's Eq. Jur. §§ 227, 228 ; Smith's Man. 58, 5th edit.)

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## ALIENS.

Question.—May an alien sue for any, and what, demands in the courts of this country ?

Answer.—An alien can only sue for personal demands in the courts of this country : (Co. Litt. 129 a ; Steph. Com. 430, vol. 2.)

Q.—Is the right dependent on any, and what, circumstances ?

A.—Yes ; for, if he is the subject of one that is an enemy to the Queen (or King), he cannot maintain a suit in the courts of this country until peace between the two nations is declared, even for personal demands : (Co. Litt. 129 a ; Steph. Com. 431, vol. 2.)

Q.—Can a foreigner resident abroad file a bill for relief in the Court of Chancery here ; if so, what protection has the defendant in such a case against the plaintiff for costs ?

A.—If the foreigner is the subject of a friendly nation, he may file a bill for personal demands in the Court of Chancery here (Co. Litt. 129 a ; Steph. Com. *ubi sup.*) ; but as he resides out of the jurisdiction of the court, the defendant will be entitled to an order for security for costs,

and, in the mean time, all proceedings will be stayed : (Ayck. Ch. Pr. 320, 4th edit.)

**Q.**—Under what circumstances can a foreign state maintain a suit in an English court of equity, and by whom should the suit be instituted ?

**A.**—The two nations must be at peace. Security for costs must also be given. The suit is instituted in the name of the reigning monarch of the foreign state, in the same manner as a suit is instituted by an English subject : (Goldsmith's Eq. Pr. 348, 4th edit.) It would seem, also, that the foreign state should be recognised by the Government here to entitle it to sue : (Dan. Ch. Pr. 22.)

## PARTNERSHIP.

**Question.**—What remedy has one partner against another in case of any breach of the articles of partnership, and what proceedings are necessary to be taken to secure the assets of the partnership ?

**Answer.**—If the articles of partnership are under seal, and there has been any violation thereof, it is properly remediable by an action of covenant. If there are written articles not under seal, or the partnership is by parol agreement, the proper remedy for breach of the stipulations is by an action of assumpsit. Both these remedies, however, are utterly inadequate to provide for many exigencies connected with the partnership ; besides this, the action of account was so dilatory, cumbersome and inconvenient as to be quite unfit for the purpose ; and, in some cases, it was not available at all. Hence courts of equity exercise a concurrent jurisdiction with courts of law in all matters of partnership. If the partnership is dissolved, or a dissolution contemplated, and the effects are wanted to be secured, an account will be decreed, and a manager or receiver appointed to close the partnership business, and make sale of the partnership property : (Story's Eq. Jur. §§ 661 to 663, 672, 683 ; Smith's Man. Eq. 286; 287, 5th edit.) ~~In partnership transactions, a claim may now be filed instead of a bill : (Ayck. Ch. Pr. 406, 407.)~~

**Q.**—In what way, and under what circumstances, can partners compel an account *inter se* ?

**A.**—Where a dissolution has taken place, or is asked for, or the partnership is expired, an account will be decreed : (Story's Eq. Jur. §§ 671, 672 ; Smith's Man. Eq. 287, 5th edit.) ~~An account may now be obtained by filing a claim : (see 1st Order, April 22, 1850 ; Ayck. Ch. Pr. 405, 406, 4th edit.)~~

**Q.**—In what cases will a court of equity decree a dissolution of the partnership ?

**A.**—If it is impracticable to carry on the undertaking at all, or at least according to the stipulations of the articles, or in case of the insanity, permanent incapacity, or gross misconduct of one of the parties, equity will decree a dissolution of the partnership before the regular time : (Story's Eq. Jur. § 673 ; Smith's Man. Eq. 287, 5th edit.)

Q.—How is a partnership dissolved in ordinary cases?

A.—A partnership may be dissolved in the ordinary way by death; by the act of parties; by the bankruptcy of one, or both, or all; or by effluxion of time: (Smith's Man. Eq. Jur. 287, 5th edit.)

Q.—If a partner becomes lunatic, does the lunacy occasion a dissolution of the partnership?

A.—The lunacy does not operate as a dissolution of the partnership; but if a partner is incapacitated by permanent lunacy from performing his duties in the partnership business, equity will decree a dissolution: (see Smith's Man. Eq. Jur. 287, 5th edit.) The dissolution has reference to the date of the decree, and not to the time of the lunacy: (Adams' Eq. 248.)

### SOLICITOR AND CLIENT.

*Question.*—Explain and illustrate the general principles on which the Court of Chancery acts in adjudicating on dealings and transactions between a solicitor and his client.

*Answer.*—Between attorney and client entire good faith is required; and during the existence of that relationship between them there is a general inability to deal with each other. If an attorney contracts with or takes a bond from a person who at the time is his client, he is subject to the *onus* of proving the perfect fairness of the transaction; as the relation between them must give rise to great confidence in the attorney, or to very strong influence over the client. And a gift made to an attorney, *pendente lite*, will be set aside: (Story's Eq. Jur. §§ 310 to 313, 317, 319; and see *Harrison v. Guest*, 27 L. T. Rep. 208.)

Q.—Can a solicitor purchase or contract beneficially to himself with his client under any, and what, circumstances?

A.—It seems that a solicitor cannot purchase from his client while that relationship subsists. But a solicitor is not incapable of *contracting* with his client, but the relationship must be dissolved, or the parties must take the characters of purchaser and vendor, and all the duties of those characters must be performed. If a solicitor deals with his client without another solicitor to advise him, there will be thrown upon him (as above stated) the whole *onus* of proving the fairness of the transaction: (see Sug. V. & P. Conc. View, 545, 548; and references *supra*.)

Q.—If an attorney or solicitor be appointed and acts as trustee, is he entitled to be remunerated for his time and trouble, or only to be repaid his expenses?

A.—As a general rule, trustees are not allowed any remuneration for their trouble, but only their expenses allowed, and a solicitor being a trustee forms no exception to the rule: (*Broughton v. Broughton*, 1 Jur. (N.S.) 966.) If, therefore, it is intended that he shall have his ordinary professional charges, a provision to that effect must be introduced into the instrument creating the trust: (see Allnutt's Pract. Wills & Adms. 70, 71, 3rd edit.; Ayck. New Ch. Pr. 484; 27 L. T. 12.)



**Q.**—Define the nature and extent of a solicitor's lien on papers in his hands belonging to his client, and also of his lien on a fund recovered in a suit.

**A.**—The lien of a solicitor on the deeds, books and papers of his client for his costs is not like a lien arising in the case of contract; it has not the character of a pledge or a mortgage, but is merely a right to withhold the deeds, &c. which have come into his possession as solicitor, and not a right to enforce his claim against the client. It prevails as against the representatives of the client, but it is only commensurate with the right of the client; so that a prior incumbrancer cannot be affected by it; and when a mortgage is paid off, the solicitor of the mortgagee cannot retain the deeds. But a solicitor has a lien on a fund realised in a suit for his costs of the suit, or immediately connected with it; and this is a lien which he may actively enforce: (see Smith's Man. Eq. Jur. 278, 5th edit.)

**Q.**—What authority ought to be taken by a solicitor from his client for the prosecution or defence of a suit in equity?

**A.**—Before commencing proceedings in the Court of Chancery, the solicitor should be careful to obtain a special authority from his client to institute or defend the suit; and although such authority may be by *parol*, yet, according to the strict rules of practice, there ought to be a warrant in *writing* for that purpose. If such precaution is dispensed with, and the authority is afterwards disputed by the client, the *onus probandi* will lie on the solicitor: (Goldsmith's Eq. Pr, 206, 4th edit.) This authority is called a *retainer*.

**Q.**—Can the solicitor be made a party to a suit for the purpose of compelling a discovery from him?

**A.**—If a bill of discovery be filed against a solicitor, he cannot be compelled to disclose the secrets of his clients; unless the bill charges him with fraud, as if he has assisted a client in obtaining a fraudulent deed: (Story's Eq. Jur. §§ 1496, 1500.)

## ARBITRATION.

**Question.**—Can an arbitrator under any, and what, circumstances be made a party in a suit for the purpose of impeaching his award?

**Answer.**—Yes; upon due proof of misconduct, partiality, fraud, or corruption; and equity will set aside the award: (Story's Eq. Jur. §§ 1451, 1452, 1498, 1500.)

**Q.**—Where a submission to reference has been made a rule of a court of common law, has, or has not, a court of equity jurisdiction to afford relief against the award which has been made in pursuance of such submission?

**A.**—The statute 9 & 10 Will. 3, c. 15, authorising submissions to arbitration to be made a rule of a court of record, seems to have ousted the jurisdiction of courts of equity over awards made under submissions pursuant to the statute. Where the award is obtained by undue means, the statute enables the court of which the submission is made a rule, to set it aside on affidavit: (Story's Eq. Jur. § 1450, and note.)

## WASTE.

*Question.*—What is waste, and what are the acts which constitute waste?

*Answer.*—Waste is the destruction, or material alteration, by a tenant for life or years, of any part of the tenement, to the injury of the person entitled to the inheritance; such, for example, as the demolition of buildings, or the cutting of timber. There are two kinds of waste, *voluntary* and *permissive*—the first by the tenant's voluntary act, as where he pulls down a house; the other by his default, as by suffering it to remain out of repair: (see Co. Litt. 53 a; 1 Steph. Com. 247, 276, and note, 3rd edit.)

*Q.*—State some of the ordinary cases in which the Court of Chancery will interfere to prevent the committing of waste.

*A.*—A Court of Chancery will restrain, by injunction, the committal of voluntary waste; as where a tenant for life pulls down buildings or fells timber. But courts of equity have no means of interfering in cases of permissive waste by a tenant for life: (Smith's Man. Eq. Jur. 344, &c. 5th edit.; 1 Steph. Com. 247, 276, 3rd edit.)

*Q.*—What is meant by “equitable waste:” will a tenant for life, without impeachment of waste, be restrained from committing it?

*A.*—If a tenant for life has his estate given him by a written instrument, expressly declaring his estate to be without impeachment of waste, he is allowed to cut timber in a husbandlike manner, and to open mines, &c.; but if he pulls down or defaces the family mansion, or fells timber, planted and growing for ornament, or commits injuries of a like nature, it is termed *equitable waste*, and the Court of Chancery will restrain him by injunction: (see Story's Eq. Jur. § 912; Will. Real Pro. 24, 25, 4th edit.; Smith's Man. Eq. 344, 5th edit.)

*Q.*—Will a court of equity interfere before the defendant's appearance to stay waste?

*A.*—Yes; but the application for the injunction must be supported by affidavit, verifying the statements in the bill. And, in such cases, leave will be granted to serve notice of motion for the injunction *before* the bill is filed: (see Ayck. New Ch. Pr. 215, 216.)

*Q.*—Can a court of equity permit the tenant for life of an estate who is impeachable for waste to commit waste; and will it permit a tenant, whether so impeachable or not, to grant a lease for a longer period than twenty-one years, or the life of such tenant? If so, state under what circumstances, and by what authority, it has such power.

*A.*—It may be as well to observe that the Court of Chancery will restrain a tenant for life impeachable for waste, from committing it. So it will restrain a tenant for life, whose estate is given to him unimpeachable for waste, from committing what is termed equitable waste: (see Story's Eq. Jur. §§ 912, *et seq.*) By the stat. 19 & 20 Vict. c. 120 (Leases and Settled Estates Act), however, the Court of Chancery is empowered, if it thinks proper and consistent with a regard to the interest of all

parties entitled under the settlement, and subject to the provisions and restrictions contained in the act, to authorise leases of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, *whether involving waste or not*, provided the following conditions be adopted: Every such lease shall be made to take effect in possession within one year after the making thereof, and shall be for a term of years not exceeding, for an agricultural or occupation lease twenty-one years; for a mining lease or lease connected with water, forty years; and for a building lease, ninety-nine years; or where the court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant leases (other than agricultural leases) for longer terms, then for such term as the court directs. Further conditions are imposed: (see 19 & 20 Vict. c. 120, s. 2; 21 & 22 Vict. c. 77.)

**Q.**—Will a court of equity restrain a tenant for life without impeachment of waste from cutting down any, and what, timber; and supposing such tenant for life to cut down such timber and to sell the same, to whom will the money produced by such sale belong?

**A.**—A court of equity will restrain a tenant for life without impeachment of waste from cutting down timber which is planted and growing for ornament or shelter of the property; this being termed equitable waste: (see Story's Eq. Jur. §§ 912, 915.) If the tenant for life should cut down such timber and sell it, the proceeds will belong to the remainderman or reversioner. The proper remedy is to file a bill for an injunction and account: (Story's Eq. Jur. §§ 515, &c.)

## RECEIVER.

**Question.**—What are the ordinary cases in which a receiver is appointed? And state any special cases.

**Answer.**—The ordinary cases in which a receiver is appointed are those in which the suit arises out of claims by parties having equitable interests in the subject: (Story's Eq. Jur. §§ 829, 830.) The court will not appoint a receiver unless a cause is pending, except in the case of idiots and lunatics. A receiver was appointed of a Government pension, the trustees being out of the jurisdiction: (Ayck. Ch. Pr. 458, 4th edit.) So where there is a manifest breach of trust by an executor by wasting the property, a receiver will be appointed, but not otherwise: (see Goldsmith's Eq. Pr. 213, 4th edit.)

*Tenant for life of renewal electing to renew remainderman may file a bill to have receiver*  
**Q.**—Give instances of persons who, in a suit in equity praying for a receiver, are disqualified from being appointed such receiver.

**A.**—A peer cannot be appointed a receiver; neither can a receiver-g general of a county, nor a master in Chancery; so the solicitor in the cause cannot be appointed: (see Ayck. New Ch. Pr. 457.) *nor an infant*

**Q.**—What are the duties of a receiver?

**A.**—His duties are to receive the rents, issues, and other profits of lands, or other things in question in the court, pending the suit; to pass

his accounts, and pay in the balances at the time appointed : (see Ayck. Ch. Pr. 457, *et seq.* 4th edit. ; Smith's Man. Eq. 351, 352, 5th edit)

*Q.*—Is any, and what, security required from a receiver in a suit ?

*A.*—Formerly, the receiver was directed to give security, to be approved of by a master, duly to account for and pay what he should receive. In future, where an order is made directing a receiver to be appointed, unless otherwise ordered, the person to be appointed is first to give security, to be allowed by the judge to whose court the cause is attached, and to be taken before an officer or agent of the court in the county, if there shall be occasion, duly to account for what he shall receive, &c. : (see further 13th Order, 16th Oct. 1852 ; Ayck. Ch. Pr. 460, 4th edit.)

*Q.*—After a receiver has received the rents, and paid all outgoings, what is his duty with respect to the balance in his hands ?

*A.*—As soon as the accounts have been passed, and the certificate obtained, the receiver's solicitor should next bespeak a direction to pay in his balance, for which purpose he attends at the accountant-general's office ; and upon his producing the order directing the appointment of the receiver, together with the certificate, the direction will be prepared, and may generally be obtained on the second day following ; and the money is then paid into the Bank of England : (see Ayck. Ch. Pr. 462, 463, 4th edit.)

*Q.*—If previously to a decree a receiver is appointed, and the decree does not in any way notice the appointment, does the omission affect the continuance of the receiver ?

*A.*—The appointment of a receiver made previously to a decree will be superseded by it, unless the receiver is expressly continued : (Dan. Ch. Pr. 1629, 2nd edit.)

*Q.*—Is a receiver liable under any, and what, circumstances for moneys belonging to the estate deposited by him with a banker, who afterwards fails ?

*A.*—A receiver is liable for any loss which may be occasioned to the estate from his wilful default ; therefore, if he places money received by him in what he knew to be improper hands, he will be personally liable ; but if he deposits money with a banker for safe custody, he will not be answerable for the failure of the banker, if the moneys are not mixed with his own, and they were *bonâ fide* deposited for safe custody under circumstances in which they could not properly have been paid into court. A receiver will, however, be answerable for the loss occasioned by the failure of a banker with whom he deposits moneys for security, if the deposits be made in such a way that he parts with the absolute control over the fund : (Dan. Ch. Pr. 1629, 2nd edit.)

## INJUNCTIONS.

*Question.*—What is an injunction? And mention the different kinds of injunctions.

*Answer.*—An injunction is a writ in the nature of a prohibition. Injunctions are of two kinds: 1. Special injunctions, by which parties are restrained from committing waste, damage, or injury to the property of others. 2. Common injunctions, by means of which the Court of Chancery, upon a bill of discovery being filed, stays or controls the proceedings in an action at law until the plaintiff at law (defendant in equity) has fully answered all the inquiries addressed to him: (Ayck. Ch. Pr. 214, 4th edit.) But the practice with respect to common injunctions is now assimilated, so far as the case will admit, to the practice with respect to special injunctions generally: (15 & 16 Vict. c. 86, s. 58; Ayck. *ubi sup.*)

*Q.*—State generally in what cases the Court of Chancery will interfere by way of injunction.

*A.*—Injunctions are granted for staying proceedings at law; to prevent waste; the continuing of nuisances; pirating copyright; using trade marks; in cases of breaches of patents for inventions; quieting possession; publication of private letters; the sailing of a ship; to restrain the carrying on of a trade contrary to lawful covenants, &c.: (see Goldsmith's Eq. Pr. 103, *et seq.* 4th edit.; Story's Eq. Jur. § 874, *et seq.*; Smith's Man. Eq. 344, *et seq.* 5th edit.)

*Q.*—How is an injunction obtained?

*A.*—In order to ground an application for an injunction, it is necessary that a bill should be first filed, and the writ must be prayed for in the prayer of relief. The injunction is obtained by motion to the court, and is in some cases granted on an *ex parte* application, while in others it is necessary to serve the defendant with notice of motion. After the appearance of the defendant, a motion for an injunction cannot be made *ex parte*. Every application for a special injunction before answer, except in an interpleader suit, must be supported by an affidavit verifying the statements in the bill. No injunction is now granted as of course: (Ayck. Ch. Pr. 214, *et seq.*; Smith, *supra.*)

*Q.*—Is the time when the party applying for an injunction first became acquainted with the circumstances on which the application is founded, material or immaterial? In either way of answering the question, give the reason.

*A.*—An injunction will not be granted in cases of gross laches, or delay, by the party seeking the relief in enforcing his rights; as, for example, where in case of a patent, or copyright, the patentee has lain by and allowed the violation to go on for a long time without objection or seeking redress; because, as before stated, equity discounts laches, and an injunction in such a case would not be a fit mode of redress under all the circumstances: (see Story's Eq. Jur. §§ 895, 896, 959 a.)

*Q.*—On an application for an injunction, will the omission by the

party making such application to state fairly all the circumstances within his knowledge material to the case, involve any, and, if any, what particular consequences ?

A.—An injunction that has been obtained on a concealment of facts may be dissolved on that ground. But this does not preclude the party from making an application for another injunction upon the merits : (Ayck. Ch. Pr. 218, 4th edit.)

Q.—May a special injunction be obtained in any, and what, cases without notice ?

A.—When the grievance sought to be restrained is very pressing, the injunction may be applied for upon a certificate of the bill having been filed, and an affidavit verifying the statements in the bill, without either serving the defendant with a copy of the bill or notice of motion : (Ayck. Ch. Pr. 216, 4th edit.)

Q.—Describe the various steps necessary to obtain an injunction *ex parte*, and state whether the defendant can be restrained by any, and what, means before the actual issue of the writ ?

A.—In order to ground an application for an injunction, it is necessary that the bill should be filed and the writ prayed for in the prayer for relief. Where the grievance sought to be restrained is very pressing, the injunction may be applied for *ex parte*, upon producing a certificate that the bill is filed ; and an affidavit verifying the allegations in the bill must be produced. After a defendant has appeared, however, an injunction cannot be obtained *ex parte*. The application for the injunction is made by motion to the court now in all cases. If the matter be very urgent, as soon as the court has pronounced an order, the plaintiff may serve the person enjoined with a notice in writing, stating that an order has been obtained, and that the writ will be sealed and served as soon as the order is passed, or a copy of the minutes of the order, signed by the registrar, may be served personally, at the same time showing the original, either of which will be sufficient to stop the defendant's proceedings provided the plaintiff loses no time in serving the writ of injunction : (see Ayck. New Ch. Pr. tit. "Injunctions.")

Q.—If the defendant is aware that an injunction is about to be applied for *ex parte*, and is advised that it would not be granted if the motion were opposed, what course should the solicitor adopt ?

A.—If the defendant in the case supposed is aware that an injunction is about to be applied for *ex parte*, and wishes his solicitor to oppose the motion, the solicitor must procure office copies of the affidavits filed by the plaintiff, and to these he may either reply at once by affidavits contradicting them, or he may content himself with cross-examining the plaintiff's witnesses in the examiner's office ; or he may take both courses concurrently. If there is not sufficient time for either of these courses, he gives counsel a brief to oppose the motion, and instructs him to appear and ask for time to answer the affidavits : (see Drewry's Ch. Pr. 74.)

Q.—Where an injury to property is apprehended, will a court of equity assist ; and how, and for what, injuries will the court apply a remedy ?

A.—Where an injury to property is apprehended, a court of equity will prevent it by injunction : (see the cases enumerated, *supra*.)

**Q.**—Will a court of equity under any, and what, circumstances restrain a creditor from proceeding at law who is not a party to the suit?

**A.**—Yes; as soon as a decree to account is made in a creditor's suit for the administration of assets, equity will restrain a creditor from proceeding at law: (see Story's Eq. Jur. §§ 549, 890, and *ante*, p. 240; Smith's Eq. 220, 5th edit.)

**Q.**—What proceedings are to be taken to restrain such creditor from continuing his action?

**A.**—An injunction must be issued against him: (Story's Eq. Jur. §§ 549, 890; Smith's Man. Eq. 220, 5th edit.)

**Q.**—Has a party by whom *private letters* have been written and sent to another person any property, absolute or qualified, in the letters so sent as against the person receiving them? If so, under what circumstances, to what extent, and in what way can he assert his title to this species of property in a court of equity?

**A.**—The property which a receiver of private letters has in them is of a qualified kind; for the property beyond the purpose for which the letter was sent is in the sender. Courts of equity will therefore restrain by injunction the publication of private letters, whether of a literary character or otherwise, where the publication is attempted without the consent of the author: (see Story's Eq. Jur. §§ 944, *et seq.*; Smith's Man. Eq. 348, 5th edit.)

**Q.**—A. B., being in partnership with C. D., is about to draw and negotiate bills of the firm for his private purposes; what course would you advise C. D. to adopt for his security?

**A.**—To apply to a court of equity for an injunction to restrain A. B. from negotiating the bills: (Story's Eq. Jur. § 669.)

**Q.**—Where a suit seeks an injunction to stay proceedings at law, in what time after the filing of the bill is the plaintiff entitled to an injunction?

**A.**—On the bill being filed, and the defendant having neglected to appear or answer the bill in due time, the plaintiff is entitled to apply for an injunction. The time within which the defendant must appear is within eight days after the service of the copy of the bill upon him (Ayck. Ch. Pr. 77, 4th edit.); and the time for him to answer, when required to answer, is within fourteen days after the delivery to him or his solicitor of a copy of the interrogatories which he is required to answer: (19th Order, 7th Aug. 1852.)

**Q.**—A lessee of a farm is under covenant not to plough up meadow land, or to remove hay or straw off the farm; the lessee takes steps which indicate the intention to plough up meadow, or to remove hay or straw: what remedy, if any, has the lessor in equity?

**A.**—If a lessee of a farm who is under covenant not to plough up meadow land, or remove hay or straw off the farm, takes steps to do so, the remedy which the lessor has in equity is by filing a bill for an injunction to restrain the lessee from so doing: (see Story's Eq. Jur. §§ 721, 959 b.)

**Q.**—The fifth volume of "Macaulay's History of England" is published during the long vacation after the courts have risen. A book-

seller publishes a pirated edition; the owner of the copyright seeks your advice on his remedy. State the course which you would advise him to adopt so far as the injury is remediable in equity; the proceeding, step by step, for obtaining such remedy, and the time within which it can be obtained.

A.—If the fifth volume of Macaulay's "History of England" is published in the long vacation, and a bookseller publishes a pirated edition, the owner of the copyright must file a bill for an injunction and an account in order to prevent the bookseller selling such pirated edition: (Story's Eq. Jur. §§ 935, 949; Smith's Man. Eq. 347, 5th edit.) If the injunction is applied for in the long vacation, after the court has risen, the plaintiff need not now present a petition as was formerly done, but the application may be made by motion to the court when sitting: (Notice, Aug. 1858.) But special directions, as to the mode of obtaining writs of injunctions and writs of *ne exeat regno*, are now made by the vacation judge in each year: (see Notice, 4th Aug. 1859, M.R.)

Q.—A. contracts with B. in general terms that he will cease to carry on a trade, but subsequently violates his contract; has B. any remedy in equity? And give the reason for your answer.

A.—Contracts in general restraint of trade are void, because they tend to discourage industry, enterprise and just competition. In the case put therefore in the question, B. will have no remedy, for the reasons given. But a person may be restrained from carrying on trade in a particular place, or with particular persons, or for a reasonably limited time. And a person may lawfully sell a secret in his trade or business, and restrict himself from using the secret: (see Story's Eq. Jur. § 292; Smith's Man. Eq. 64, 5th edit., *et ante* p. 233.)

Q.—What proceedings at law are restrained by an injunction, when the latter is obtained before delivery of declaration?

A.—It stays the delivery of the declaration and all further proceedings: (Story's Eq. Jur. §§ 874, 886.)

Q.—In a suit in the Court of Chancery is there, or is there not, any difference in the effect of the injunction to restrain proceedings at law arising out of the extent to which those proceedings have gone at the time when the injunction is obtained? If so, state in what that difference consists, and under what circumstances it arises.

A.—Injunctions to stay proceedings at law may be either total or partial, temporary or perpetual. Injunctions of this sort are sometimes granted to stay trial; or, after judgment, to stay execution; or, if the execution has been effected, to stay the money in the hands of the sheriff; or, if part only of the judgment debt has been levied, by a *fieri facias* to restrain the suing out of another *fi. fa.* or a *ca. sa.*, according to the exigency of the particular case: (see Story's Eq. Jur. §§ 873, 874, 886.)

Q.—In what cases does the Court of Chancery, upon granting an injunction, direct an issue to be tried in a court of law; and for what purpose is such issue generally directed?

A.—Before a court of equity will interfere by injunction to restrain the breach of a patent, where the patent has been but recently granted, and its validity has not been ascertained by a trial at law, and the defendant denies it or puts the matter in doubt, there, in general, the court



will not grant an immediate injunction, but will require the validity of the patent to be ascertained by a court of law. If the patent has been granted for a length of time, and the patentee has put the invention into public use, and has had an exclusive possession of it under his patent for such a period of time that there is a fair ground for presuming he has an exclusive right, the court will ordinarily interfere by way of preliminary injunction; still the right must be established in a court of law. Similar principles apply to cases of copyright: (see Story's Eq. Jur. §§ 934, 935.) For the purpose of trying its validity at law, an issue is sent. But, it must be remembered, the Court of Chancery may now determine the legal title or right of parties seeking equitable relief without requiring them to proceed to establish such legal title or right at law, under the stats. 15 & 16 Vict. c. 68, and 21 & 22 Vict. c. 27. But even under the latter act it has been decided that the court has no power to try by jury a question of right, but only a question of fact: (see *Griffiths v. Turner*, 33 L. T. Rep. 5; see also *George v. Whitmore*, 32 L. T. Rep. 290.)

**Q.**—Where an injunction has been obtained for stay of proceedings at law, is the plaintiff entitled to an order to amend his bill without prejudice to such injunction?

**A.**—Yes; the plaintiff may obtain an order to amend his bill without prejudice to an injunction; but, in such a case, he must amend within seven days from the date of the order: (16th Order, May 1845, art. 35.) The 35th article has been held not to apply to a suit in which a special injunction has been obtained; and, as the common injunction is now abolished, the 35th article would seem, under the new practice, not to apply in any case: (see Ayck. New Ch. Pr. 21, 22; Hallilay's Ch. Suit, 42.)

**Q.**—If a bill is filed to stay proceedings at law, and an injunction granted which is afterwards dissolved upon the defendant's answer, can a plaintiff amend his bill, and again apply for an injunction?

**A.**—Yes; he may amend his bill, and again apply for an injunction to stay proceedings at law.

**Q.**—How is an injunction put in force?

**A.**—By serving a copy of the writ on all the parties enjoined; and, on breach thereof, moving the court that all the parties may stand committed: (Ayck. Ch. Pr. 217, 220, 4th edit.)

**Q.**—Is it necessary for a defendant to answer before applying to dissolve an injunction? How is the common injunction dissolved; and when, and how, can the special injunction be dissolved?

**A.**—Formerly a defendant could not have dissolved the common injunction till he had answered: (see Ayck. New Ch. Pr. 218.) But now, as the practice on the common injunction is assimilated to that of the special injunction, there is no difference in the mode of proceeding to dissolve injunctions. The course is to serve the plaintiff's solicitor with a notice of motion to dissolve; and the defendant may either make the motion on affidavits in answer to those filed by the plaintiff or he may wait until he has filed his answer, and then move to dissolve the injunction, using his answer as an affidavit: (see 15 & 16 Vict. c. 86; Smith's Ch. Pr. 487, 5th edit.; Drew. Ch. Pr. 34.)

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### WRIT OF NE EXEAT REGNO.

*Question.*—In what cases, and upon what grounds, is a writ of *ne exeat regno* granted?

*Answer.*—This writ is granted in those cases in which the plaintiff is apprehensive that the defendant is about to leave the kingdom for the purpose of avoiding the plaintiff's demands. It can only be obtained when the plaintiff has an equitable demand, except in the case of an order for alimony, and then only for arrears and costs actually due, or for a sum due upon the balance of an account. The demand must be clear, and a money demand, and actually due: (Ayck. New Ch. Pr. 221; Smith's Man. Eq. 349, 5th edit.)

*Q.*—In case of a demand for which the debtor cannot be arrested, and the debtor is about to quit the country, will a court of equity interfere to prevent his so doing? And what are the necessary proceedings to be taken for that purpose?

*A.*—In such a case a writ of *ne exeat regno* must be applied for. It may be obtained at any period of the suit; but a bill must be first filed. The application must be supported by affidavit, verifying the material allegations in the bill. When the order is obtained, the writ must be then prepared, and forwarded to the under-sheriff of the county into which it issues, by whom it is executed: Ayck. New Ch. Pr. 222, 223; Smith, *supra*.)

*Q.*—State the origin of the jurisdiction assumed by courts of equity in granting writs of *ne exeat regno*.

*A.*—It was originally a prerogative writ applicable only to the purposes of State. It has, however, of late become a part of the ordinary process of the court, and may be considered as a species of equitable bail: (Ayck. New Ch. Pr. 221; Story's Eq. Jur. § 1467, and note; Smith's Man. Eq. 349, 5th edit.)

### SALE.

*Question.*—What are the circumstances which will warrant the opening of biddings at a sale, and what is the course of proceeding for that purpose?

*Answer.*—In general, the court will not open the biddings after the purchaser has confirmed the chief clerk's certificate, unless some particular principle arose out of his character, as connected with the ownership of the estate, or some trust or confidence, or his own conduct in obtaining the certificate. In ordinary cases, the

court will not permit the biddings to be opened, except upon an advanced bidding. As a general rule, 10% per cent. was formerly considered to be a sufficient advance on a large sum. In some cases the court will be satisfied with less, and in others require more. An order is necessary for the purpose; it is obtained on special motion, notice of which must be served on the purchaser's solicitor, as also on the solicitors of the parties in the cause. If the order is granted, the applicant must then pay in his deposit, as also the costs, charges and expenses of the first purchaser, and thereupon a re-sale takes place: (see Ayck. Ch. Pr. 395, *et seq.*; Smith's Ch. Pr. 5th edit.)

Q.—Estates are liable to the payment of debts, and such estates are vested in a tenant for life, or other person having only a limited interest, and the remainder or reversion in fee is vested in other persons, whether within or out of the jurisdiction of the court of equity; how can the sale of such estates be perfected, and under what authority?

A.—If the estates liable for payment of debts are vested in the tenant for life, or other person having a limited interest by devise, with the remainder or reversion over, which might or might not be vested in some person from whom a conveyance or other assurance of the same cannot be obtained, and a decree be made for the sale thereof for the payment of such debts, the court may direct the tenant for life, or person having a limited interest, to convey the whole estate in the premises of which he is only tenant for life, &c.: (see 11 Geo. 4 & 1 Will. 4, c. 47, s. 12; 2 & 3 Vict. c. 60.) The power given by these acts will now, in a great measure, be superseded by the provisions of the recent act to consolidate and amend the laws relating to the conveyance and transfer of real and personal property vested in mortgagees and trustees: (see 13 & 14 Vict. c. 60, *et ante*, pp. 161, 236, 237.) *by vesting order*

Q.—A freehold estate stands limited to A. for life, remainder to his son B. (an infant) for life, remainder to the first and other sons of B. in tail, and the settlement contains no power of sale. Can the estate be sold, and what proceedings are necessary for the purpose?

A.—If a freehold estate stands limited to A. for life, remainder to his son B. (an infant) for life, with remainder to the first and other sons of B. in tail, and the settlement contains no power of sale, the estate may nevertheless be sold by the authority of the Court of Chancery. The application may be made by A. upon petition in a summary way under the provisions of the 19 & 20 Vict. c. 120, "An Act to facilitate Leases and Sales of Settled Estates:" (see ss. 11, 16.)

Q.—Refer to any recent act of Parliament under which the Court of Chancery (notwithstanding the absence of a power in the settlement) can authorise a sale or lease of settled estates without a special application to Parliament.

A.—By the 19 & 20 Vict. c. 120, the Court of Chancery is empowered to grant leases of settled estates, subject to certain conditions (see next answer), and authorise sales of settled estates and of timber (not being ornamental timber) growing on any settled estates; such sale being conducted and confirmed in the same manner as sales under a decree of the court: (see ss. 2, 11.) But sect. 27 enacts, that the court is not to authorise any lease, sale, or act which could not have been authorised by the settlor.

Q.—State shortly the circumstances in which the court is, by the act

referred to, authorised to exercise jurisdiction, and the mode of proceeding.

*A.*—With respect to leases, the lease must be made to take effect in possession or within one year after the making thereof; and if it is an agricultural or occupation lease, the term must not exceed twenty-one years; if a mining or water lease, it must not exceed forty years; if a building lease, not more than ninety-nine years, unless the court otherwise orders. The best rent that can reasonably be obtained must be reserved, payable half-yearly or oftener, without fine. If the lease is of any earth, coal, stone, or mineral, and the person for the time being entitled to the rent is also entitled to work such mines for his own benefit, a portion of the rent must be invested. No such lease is to authorise the felling of trees, except when necessary for building purposes, &c. The lease must be by deed, and a counterpart executed by the lessee, and must contain a condition for re-entry on non-payment of rent for twenty-eight days after it becomes due: (sect. 2.) The court directs who is to execute the deed as lessor: (sect. 9.) The mode of making the application to the court under this act is by petition in a summary way: (sect. 16.) The application must be made with the consent of the following persons: a tenant in tail under the settlement, if of full age, and if more than one, then the first of such tenants in tail, and all persons in existence having any estate or interest under the settlement prior to the estate of such tenant in tail, whether as trustees for living or unborn persons, or in their own right: (sect. 17.) But if these persons, not having an estate of inheritance, refuse to consent, or their consent cannot be obtained, the court may nevertheless give effect to the petition, not affecting the interests of such parties: (see sect. 18; and see further the act.) (*a*)

## DISCOVERY.

*Question.*—What is a bill of discovery?

*Answer.*—Every bill is in reality a bill of discovery; but the species of bill usually so distinguished by this title is a bill for discovery of facts resting in the knowledge of the defendant, or of deeds, or writings, or other things in his custody or power, and seeking no relief in consequence of the discovery: (Ayck. Ch. Pr. 203; Story's Eq. Jur. § 1483; Smith's Man. Eq. 398, 5th edit.)

*Q.*—When the defence to an action at law arises from facts within

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(*a*) The following question may easily be answered from this and the foregoing answer: *A.* is entitled to the possession of a settled estate for a lease of years determinable on his death. The settlement contains no power of leasing. Can the defect be supplied, and by what means? Will *A.* have to obtain the concurrence of any other person interested under the settlement?

the knowledge of the plaintiffs at law, how can the defendant at law elicit such facts from the plaintiffs at law ?

A.—Formerly his only mode of so doing would have been by filing a bill of discovery, but now by the combined effect of the 14 & 15 Vict. c. 99, and the 17 & 18 Vict. c. 125, it is no longer necessary to go to equity for the purpose of obtaining a discovery of facts resting in the knowledge of the opposite parties: (see *ante*, p. 226.)

Q.—A. brings an action against B., in which C. is a material witness for the former, but without having any interest whatever in the matters in question between these two parties. Can or cannot B., who is ignorant of what C. will depose to against him, compel C. to disclose his evidence by means of a bill of discovery in a court of equity? And give the reason for your answer.

A.—It is ordinarily a good objection to a bill of discovery that it seeks the discovery from a defendant who is a mere witness and has no interest in the matter in question, for, as he may be examined as a witness in the action, there is no ground to make him a party to a bill of discovery, unless the bill charges him with fraud; as in the case of an attorney who has assisted a client in obtaining a fraudulent deed: (see Story's Eq. Jur. §§ 1489, 1495, 1499, 1500; Smith's Man. Eq. 400, 5th edit.)

Q.—Of what matters will the court not compel a discovery ?

A.—The following are some of the matters in which equity will not compel a discovery: where the policy of the law exempts the defendant from the discovery, as if a bill of discovery is filed against a married woman to compel her to disclose facts which may charge her husband; or when the bill seeks to compel a counsel or solicitor to disclose the secrets of his clients. So equity will not compel a discovery of matters which are not material in the suit; or of a man's own title; or generally where the discovery would subject the defendant to a criminal prosecution or to ecclesiastical censures: (see Story's Eq. Jur. § 1489, &c.; Smith's Man. Eq. 399, *et seq.* 5th edit.)

Q.—What is the distinction between a bill for discovery and relief, and a bill for discovery only; and in what respect do the proceedings on the two bills differ ?

A.—A bill for discovery and relief goes on to a hearing, whilst a bill for discovery only, stops when the discovery is obtained, and never goes to a hearing: (Ayck. Ch. Pr. 204, 4th edit.)

Q.—Has any, and what, alteration been made in the practice with respect to reading the answer to a cross bill for discovery ?

A.—Yes; the answer to such cross bill may now be read and used by the party filing such cross bill in the same manner and under the same restrictions as the answer to a bill praying relief may now be read and used: (42nd Order, Aug. 1841; Ayck. Ch. Pr. 209, 4th edit.)

Q.—In order to sustain a bill of discovery, what must clearly appear on the face thereof ?

A.—The matter touching which the discovery is sought, the interest of the plaintiff and defendant in the subject, and the right of the first to require the discovery from the other: (Ayck. Ch. Pr. 204, 4th edit.)

Q.—In the case of a bill being filed merely for discovery, what is the rule respecting the payment of costs of the proceedings ?

A.—As soon as the defendant has filed his answer, and the time allowed for excepting has expired, he may move for an order as of course for his costs of suit: (Ayck. Ch. Pr. 205, 4th edit.)

Q.—Can the defendant move to dismiss a bill filed for discovery only, and not for relief?

A.—When the bill does not pray relief, the defendant cannot move to dismiss the suit: (*Woodcock v. King*, 1 Atk. 80; Ayck. Ch. Pr. 204; Hallilay's Ch. Suit, 80.)

Q.—State the mode by which a defendant can, under the act 15 & 16 Vict. c. 86, obtain discovery from the plaintiff, and how such discovery was obtained under the former practice.

A.—By sect. 19 of the above act it is enacted, that it shall be lawful for any defendant in any suit, whether commenced by bill or by claim (but as to suits commenced by bill, where the defendant is required to answer the plaintiff's bill, not until after he has put in a full and sufficient answer to the bill, and without filing any cross bill of discovery), to file in the record office of the court interrogatories for the examination of the plaintiff, to which shall be prefixed a concise statement of the subjects on which a discovery is sought; and to deliver a copy of such interrogatories to the plaintiff or his solicitor; and the plaintiff is bound to answer such interrogatories in like manner as if they had been contained in a bill of discovery filed by the defendant against the plaintiff: (see 15 & 16 Vict. c. 86, s. 19; Ayck. Ch. Pr. 105; Hallilay's Ch. Suit, 32.) Under the former practice a cross bill must have been filed to obtain such discovery: (*ib.*)

Q.—Can the defendant, before or after answering, examine the plaintiff himself upon matters material to the suit? Can he obtain inspection of documents in the plaintiff's possession to enable him to answer; and how can the defendant obtain relief in the suit so instituted against him?

A.—As above stated, the defendant may file interrogatories for the examination of the plaintiff, but in a suit commenced by bill, which the defendant is required to answer, not until he has fully answered the plaintiff's bill, unless the court otherwise orders: (15 & 16 Vict. c. 86, s. 19.) But, as the court is not empowered under this act to administer relief consequent upon the discovery, it will still be necessary, where the defendant wants such relief, for him to file a cross bill: (see Hallilay's Ch. Suit, 32; Ayck. New Ch. Pr. 105.) This act also empowers the court to make an order for the production of documents, relating to the suit, by the plaintiff on oath; but where the defendant is required to answer, not until he has fully answered. The order for production and inspection may be obtained on summons at chambers: (see Hallilay's Ch. Suit, 51; and see hereon *Walker v. Kennedy*, 29 L. T. Rep. 37.)

## INTERPLEADER.

*Question.*—What is the nature and effect of a bill of interpleader?

*Answer.*—Where two or more persons claim the same thing by different or separate interests, although derived from the same source, or the one from the other, and another person, not knowing to which of the claimants he ought of right to render or deliver the property in his custody, and wherein he claims no interest, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them. A bill of interpleader is an original bill: (see *Ayck. Ch. Pr.* 199, 4th edit.; *Story's Eq. Jur.* § 806, and note; *Smith's Man. Eq.* 329, 5th edit.; *Goldsmith's Eq. Pr.* 129, 4th edit.)

*Q.*—What affidavit must a plaintiff make on filing a bill of interpleader?

*A.*—The plaintiff must annex to his bill an affidavit that it is not exhibited in collusion with any of the parties: (*Ayck. Ch. Pr.* 200; *Smith's Man. Eq.* 332, 5th edit.; *Smith, sup.*)

*Q.*—Where a deposit is paid to an auctioneer at a sale, and there should arise a dispute between the vendor and purchaser, and an action is threatened or commenced against him by either for the deposit; what is the course to be pursued by the auctioneer to protect himself against their adverse claims?

*A.*—He must file a bill of interpleader. But if an action is brought against an auctioneer for a deposit, and he insists on retaining his commission, he cannot file a bill of interpleader, as he then claims an interest in the fund: (see *Story's Eq. Jur.* §§ 807, and note, 808, 814, and note.)

*Q.*—A. and B. claim property which is in C.'s hands, but in which C. has no interest. How can C. protect himself? If C. had himself any interest in the property, would it make any difference in the nature of the proceedings?

*A.*—If C. claims no interest in the property, he may file a bill of interpleader, and so obtain protection; but if he himself claims an interest in the property, he is then precluded from filing a bill of interpleader: (see *Story's Eq. Jur.* §§ 806, and note, 807, and note.)

## PERPETUATING TESTIMONY.

*Question.*—What is the nature and effect of proceedings in equity to perpetuate the testimony of witnesses?

*Answer.*—A bill to perpetuate testimony is an original bill, but does not pray relief against the defendant. When the testimony of witnesses is in danger of being lost, before the matter to which it relates can be

made the subject of judicial investigation, a court of equity will lend its aid to preserve and perpetuate the testimony : (Ayck. Ch. Pr. 201 ; and see Smith's Man. Eq. 403, 5th edit.)

*Q.*—If an estate be devised by will away from the heir-at-law, and the devisee is desirous to secure the testimony of the witnesses to the will, what proceedings in equity can the devisee take to accomplish this object ?

*A.*—The devisee may exhibit a bill against the heir setting forth the will *verbatim*, and suggesting that the heir is inclined to dispute its validity ; and then, when the cause is at issue, the witnesses to the will are examined, after which the cause is at an end ; but the heir is entitled to his costs, even though he contests the will : (see Story's Eq. Jur. § 1506 ; Smith's Man. Eq. 404, 5th edit.) This bill is a bill to perpetuate testimony.

*Q.*—Has any recent statute upon this subject been passed ? If so, state its general scope.

*A.*—Yes ; the 5 & 6 Vict. c. 69, s. 1, enacts, that any person who would under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, shall be entitled, from and after the passing of this act, to file a bill in the High Court of Chancery to perpetuate any testimony which may be material for establishing such claim or right : (see further Ayck. Ch. Pr. 201, 202, 4th edit.)

*Q.*—A party entitled under a devise to real estate in remainder, after the death of another who is in possession, is apprehensive that the validity of the devise may be questioned at law on the death of the party in possession, and that the witnesses to prove the validity of the devise may then be dead. Will a court of equity give him any assistance, and in what manner ?

*A.*—Yes ; he may file a bill to perpetuate the testimony of the witnesses to the devise : (see Story's Eq. Jur. §§ 1506, 1508.)

*Q.*—In what cases cannot the evidence taken under a bill to perpetuate testimony afterwards be used ?

*A.*—Such evidence cannot be used if the witnesses are alive, and capable of attending, and within the jurisdiction at the time of the trial : (see Story's Eq. Jur. § 1507, *et seq.* ; Ayck. New Ch. Pr. 202 ; Smith's Man. Eq. 406, 5th edit.)

## THE COURTS, JUDGES, AND OFFICERS THEREOF.

*Q.*—Name the several courts having equitable jurisdiction, distinguishing those in which that jurisdiction is limited, and to what extent.

*A.*—The principal court of equity in England is the High Court of Chancery, of which the Lord Chancellor is the head : the different



branches of the court are the Court of Appeal, presided over by the Lords Justices and the Lord Chancellor, the Court of the Master of the Rolls, and the Vice-Chancellors' Courts, of which there are now three. There are also courts of equity in the Counties Palatine, in the two universities, in the city of London, and in the Cinque Ports, but their jurisdiction is limited: (4 Steph. Com. 41 n, 3rd edit.) The Common Law Procedure Act 1854 (17 & 18 Vict. c. 125), has also invested the common law courts with an equitable jurisdiction: (see *ante*, p. 228.)

**Q.**—Enumerate the equity judges in their order and rank, and describe the constitution of the courts of appeal, including the highest in the realm, and the mode of giving judgment in each.

**A.**—The order in which the equity judges rank is: 1. The Lord High Chancellor. 2. The Master of the Rolls. 3. The Lords Justices. 4. Vice-Chancellor Sir R. T. Kindersley. 5. Vice-Chancellor Sir J. Stuart. 6. Vice-Chancellor Sir W. P. Wood. The Court of Appeal is constituted by the statute 14 & 15 Vict. c. 83, by which act two Lords Justices sitting alone or with the Lord Chancellor, or one of the Lords Justices sitting with the Lord Chancellor, may hear appeals, and exercise the same jurisdiction, powers and authorities as are exercised by the Lord Chancellor. The House of Lords is the highest court of appeal in the realm, and is composed of the peers of the realm, but the judgments are in general only considered by the law lords. It is constituted by the common law. The judgments of each court are delivered by the respective judges thereof in public. The Lord Chancellor is empowered by 15 & 16 Vict. c. 80, s. 60, to deliver a written judgment within six weeks after he has retired from office. The judgments of the House of Lords are delivered by the Lord Chancellor, which are adopted by the House.

**Q.**—State the duties of the clerks of records and writs?

**A.**—Their duties are to receive and file bills, ~~claims~~ answers, and other proceedings in the suit, to enter appearances, seal writs, &c.

**Q.**—State the duties of the registrars?

**A.**—They are principally to set down causes, to take down minutes of the judgments, to draw up decrees and orders, and settle and sign them.

**Q.**—What is the distinction between the judicial and the administrative jurisdiction of the court? Name the officers who preside over each branch.

**A.**—The judicial jurisdiction of the court consists in the decision or determination of the matter which is really at issue between the litigants. The administrative jurisdiction of the court consists in the regulation of the proceedings used by the court to assist it in its judicial capacity, and to enforce its orders and decrees. The judicial officers of the court are the Lord Chancellor, the Master of the Rolls, the Lords Justices, and the three Vice-Chancellors. The administrative officers are the ~~masters~~ <sup>chief clerks</sup>, the registrars, the taxing masters, the accountant-general, the chief clerks, and the record and writ clerks; but some of the duties of these are also partly judicial, as matters that come before the masters and their successors, the judges' chief clerks.

**Q.**—Of what courts is the appellate jurisdiction composed?

**A.**—The courts of appeal are the Lords Justices' courts, created by the stat. 14 & 15 Vict. c. 83, by which the two Lords Justices, either with or without the Lord Chancellor, are empowered to hear appeals and

exercise the same powers and jurisdictions as are possessed by the Lord Chancellor. The House of Lords is (as before stated) the highest court of appeal, and is composed of the peers of the realm, but its judgments are usually considered and delivered by the law lords only.

*Q.*—How and when did the House of Lords gain the power of sitting as the highest court of appeal?

*A.*—The House of Lords succeeded to this authority, as of course, upon the dissolution of the *Aula Regia*. For, as the barons of Parliament were constituent members of that court, and the rest of its jurisdiction was dealt out to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside, it followed that the right of receiving appeals, and superintending all other jurisdictions, still remained in the residue of that noble assembly, from which every other great court was derived : (see 3 Steph. Com. 412, 3rd edit.) (*a*)

## COMMENCEMENT OF LITIGATION.

*Question.*—What are the modes of emanating proceedings in the Court of Chancery at the present time?

*Answer.*—They are the following : 1. By bill. 2. By information. 3. By claim. 4. By special case. 5. By summons before a judge at chambers. Proceedings are also taken by petition to the court, or by summons to a judge at chambers, under the Charitable Trusts Act, 1853 : (see Ayck. New Ch. Pr. 1, 442 ; Hallilay's Articled Clerk's Handbook, 34.)

*Q.*—What is the rule as to making parties to suits in equity, and has any recent alteration been made in this respect? If so, state your authority, and give one or two examples.

*A.*—Formerly the general rule of the court with respect to parties was, that all persons interested in the subject-matter of the litigation should be parties to the suit, so that the court might, in one suit, make a final determination as between all the parties. To this rule, however, there were some exceptions. And now, by the 15 & 16 Vict. c. 86, s. 42, it is enacted, that it shall not be competent to any defendant in any suit to take any objection for want of parties to such suit, in any case to which the rules next thereafter set forth extend ; and such rules shall be deemed and taken as part of the law and practice of the court, and any law and practice of the court inconsistent therewith is thereby abrogated and annulled. The following are some of the cases referred to :—

Any residuary legatee, or next-of-kin, may, without serving the

(*a*) Lord Halo, however, accounts for the appeal to the House of Lords in *equity cases* from the notorious misconduct of Bacon as a judge. See note to Lord Campbell's Life of Bacon.

remaining residuary legatees, or next-of-kin, have a decree for the administration of the personal estate of a deceased person : (Rule 1.)

Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, may, without serving any other legatee or person interested in the proceeds of the estate, have a decree for the administration of the estate of a deceased person : (Rule 2.)

Any residuary devisee or heir may, without serving any co-residuary devisee or co-heir, have the like decree : (Rule 3.)

In all the above cases (and up to Rule 6), the court, if it shall see fit, may require any other person or persons to be made a party or parties to the suit, and may, if it shall see fit, give the conduct of the suit to such person as it may deem proper ; and may make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question : (Rule 7.)

In all the above cases (and up to Rule 6), the persons who, according to the former practice of the court, would have been necessary parties to the suit, are to be served with notice of the decree, and after such notice they are to be bound by the proceedings in the same manner as if they had been originally made parties to the suit, and they may, by order of course, have liberty to attend the proceedings under the decree ; and they may apply to add to the decree : (Rule 8.) See further Ayck. New Ch. Pr. 2, *et seq.* ; Hallilay's Ch. Suit, tit. "Parties to Suits."

*Q.*—By whom must a bill be filed ?

*A.*—A bill should be filed either by the plaintiff in person or a duly-qualified solicitor.

*Q.*—How is a suit commenced under ordinary circumstances, when the rights of the Crown are concerned ?

*A.*—In such a case the suit is commenced by information. It is exhibited in the name of the Queen's Attorney or Solicitor-General, as the informant ; and a relator is generally named, who in reality sustains and directs the suit. The information must be signed by the Attorney-General, for which purpose counsel must certify that the information is proper for his sanction. A copy of the information is then left with the Attorney-General's clerk, together with a certificate by the solicitor that the relator is competent to pay the costs of the information, and that the copy is a true copy of the draft prepared by counsel, and thereupon the information is signed by the Attorney-General. Before the name of any person shall be used as relator in any information, such person must sign a written authority to the solicitor for that purpose, and such authority is to be filed with the information : (Ayck. New Ch. Pr. 209, 212 ; Smith's Ch. Pr. 78, 94, 5th edit.)

*Q.*—How are proceedings commenced when any other party besides the Crown has an interest in the subject-matter of the intended suit ; and what steps must be taken to obtain the Attorney-General's sanction to such suit ?

*A.*—When any other person besides the Crown is interested in the subject-matter in dispute (such person sustaining the character of plaintiff and relator), the pleading is called an information and bill : (see references *supra.*) As to the mode of obtaining the Attorney-General's sanction, see *supra.*

Q.—What are the usual parts of a bill in equity ?

A.—The parts of a bill are the title of the court ; the title of the cause, *i.e.*, the names of plaintiff and defendant ; the complaint, and stating part, containing all the facts and circumstances relied on ; and the prayer. The bill is signed by counsel, and the name of the plaintiff's solicitor is added at the end. The bill does not contain any interrogatories. It is also indorsed with the court, short title of the cause, and a notice commanding the defendant to appear in eight days from the service, otherwise ~~threatening an attachment~~ ; the solicitor's name is also added : (see Hallilay's Articled Clerk's Handbook, 36 ; Hallilay's Ch. Suit. tit. Bill ; Smith's Ch. Pr. 91 to 93, 5th edit.)

~~to be served on the defendant to have a decree made in his absence -~~  
Q.—What preliminary step is necessary when an infant, or a married woman, or other party under disability, is plaintiff in a suit ?

A.—Where an infant or married woman is plaintiff, they, in general, must sue by *prochein ami* : (see *ante*.) But by the 15 & 16 Vict. c. 86, before the name of any person is used in any suit in the Court of Chancery as next friend of any infant, married woman, or other party, or as relator in any information, such person must sign a written authority to the solicitor for that purpose, and such authority shall be filed with the bill, information, or claim : (sect. 11 ; and see Ayck. New Ch. Pr. 12 ; Smith's Ch. Pr. 79, 5th edit.)

Q.—Can parties, defendants, be served with process out of the jurisdiction of the court, and how ?

A.—If any of the parties, defendants, are out of the jurisdiction, the court, upon application, supported by such evidence as shall satisfy the court in what place or country such defendant is or may probably be found, may order that the bill and interrogatories may be served on such defendant in such place or country, or within such limits, as the court thinks fit to direct : (33rd Order, May 1845 art. 1 ; 15 & 16 Vict. c. 86.) At the time of serving the copy, bill and interrogatories, if any, the plaintiff is also to cause the defendant to be served with a copy of the order giving the plaintiff leave to serve the bill, &c. : (*id.* art. 3.) The court, on application, granted an order for leave to serve a copy of the bill, with a copy of the interrogatories annexed, upon defendants in Australia : (*Pearse v. Miller*, Week. Rep. 192 ; see also *Innes v. Mitchell*, 29 L. T. Rep. 273, and generally Hallilay's Ch. Suit, 8, 9 ; Ayck. New Ch. Pr. ; Smith's Ch. Pr. 101, 102, 5th edit.)

Q.—Is it necessary that all parties having an interest in real estate should be made parties to a bill against trustees, in order to carry the trusts into execution, or will it be sufficient to make the trustees only parties to the bill ?

A.—In all suits concerning real or personal estate, which is vested in trustees under a will, settlement, or otherwise, such trustees shall represent the persons beneficially interested under the trust, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the person beneficially interested in such personal estate ; and in such cases it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit ; but the court may, upon consideration of the matter, on the hearing, if it shall so think fit, order such persons, or any of them, to be made parties : (15 & 16 Vict. c. 86, s. 42, rule 9 ; Ayck. New Ch. Pr. 4, 5.) This rule not only applies to administration suits, but to all suits where the interest of the *cestui que trusts* is represented by, and his powers vested

in, the trustee : (Ayck. New Ch. Pr. 5 ; Hallilay's Ch. Suit, 4 ; Smith's Ch. Pr. 88, 5th edit.)

Q.—Is the Attorney-General a necessary party to a suit the subject of which is a legacy given to a charity already established ?

A.—In all suits relative to charitable funds the Attorney-General must be made a party : he need not be made a party, however, when a private charity is the subject of the suit, nor in respect of a legacy given to a charity on a bill filed against an executor for an account : (Goldsmith's Eq. Pr. 223, 4th edit.)

Q.—Is a bankrupt a necessary party to a bill filed against his assignees ?

A.—In general a bankrupt is not a necessary party to a suit, as defendant, relative to any property which is affected by his bankruptcy, because the interests of a bankrupt (whether legal or equitable) are vested in his assignees by virtue of their appointment : (12 & 13 Vict. c. 106, ss. 141, 142, 153 ; see also 3 P. Will. 311, note ; Bro. C. C. 228.) If, however, fraud and collusion between the assignees and the bankrupt be charged, the bankrupt may be made a party, defendant : (see Rede. Plead. 162.)

Q.—By whom must bills be signed ?

A.—Bills must be signed by counsel ; but they do not require either to be signed or sworn to by the plaintiff : (Ayck. New Ch. Pr. 8, 11 ; Hallilay's Ch. Suit, 6 ; Smith's Eq. Pr. 92, 5th edit.)

Q.—What is the consequence of omitting the prayer for general relief in a bill in Chancery ?

A.—The omission of the prayer for general relief will be fatal to the bill where the plaintiff has mistaken his special prayer of relief (except in the cases of charities and infants), unless the court allows an amendment : (Story's Eq. Pl. § 40.)

Q.—What is the distinction between multifariousness and misjoinder as applied to bills in Chancery ; and is there any, and what, difference in their consequences ?

A.—The distinction between multifariousness and misjoinder has been usually understood to be as follows : The former consists in mixing up several matters in one bill which ought to be made the subject of different suits ; whilst misjoinder is when persons are improperly introduced as parties to the record ; the difference between the two is often very difficult to distinguish. Either the one or the other forms a ground of demurrer : (see Goldsmith's Eq. Pr. 291, 292, 4th edit.) By the 15 & 16 Vict. c. 86, however, no suit is to be dismissed for misjoinder only of plaintiffs therein ; but if the plaintiffs, or any of them, are entitled to relief, the court may grant such relief notwithstanding such misjoinder, and may direct amendments, &c. : (see further ss. 49, 51 ; Ayck. New Ch. Pr. 6 ; Hallilay's Ch. Suit, tit. "Parties to Suits.")

Q.—In what cases, and upon what terms, may a written copy of a bill in Chancery be filed instead of a printed copy ?

A.—In case of a bill praying a writ of injunction, or a writ of *ne exeat regno*, or filed for the purpose, either solely or amongst other things, of making an infant a ward of court, a written copy may be filed, upon the personal undertaking of the plaintiff or his solicitor to file a printed copy within fourteen days. The bill so filed is to be deemed and taken to

have been filed at the time of filing the written copy : (15 & 16 Vict. c. 86, s. 6.) No extra costs, however, are allowed, unless directed by the court : (2nd Order, 7th Aug. 1852 ; and see Hallilay's Ch. Suit, 6 ; Ayck. New Ch. Pr. 10 ; Smith's Ch. Pr. 94, 5th edit.)

Q.—What is the mode of proceeding to give a defendant notice of a bill in Chancery being filed against him ?

A.—To give a defendant notice of a bill being filed against him, he is now served with a copy of the bill properly stamped, sealed and indorsed, instead of the writ of subpœna formerly used for that purpose : (15 & 16 Vict. c. 86, ss. 2 to 4 ; Ayck. New Ch. Pr. 13 ; Hallilay's Ch. Suit, 7, 20 ; Smith's Ch. Pr. 96, 5th edit.)

Q.—What are the several kinds of bills ?

A.—The several kinds of bills have usually been considered under three general heads : 1st, original bills ; 2ndly, bills not original ; and, 3rdly, bills in the nature of original bills : (see Mit. Plea. 31 ; Ayck. New Ch. Pr. 189 ; but see Smith's Ch. Pr. 445, 5th edit.)

Q.—State the nature and object of a bill of review.

A.—A bill of review is in the nature of an original bill. The object of this bill is to procure an examination and reversal of a decree, made upon a former bill, and signed and enrolled. It may be brought upon error of law appearing in the body of the decree itself, or upon discovery of new matter : (Ayck. New Ch. Pr. 205 ; Smith's Ch. Pr. 475, 5th edit.)

Q.—What is a cross bill ?

A.—A cross bill is in the nature of an original bill. A bill of this kind is brought by a defendant against a plaintiff or other parties in a former bill depending, touching the matter in question in that bill. It is usually brought to obtain a necessary discovery, or full relief to all parties : (Ayck. New Ch. Pr. 207 ; Smith's Ch. Pr. 445, 5th edit.) The 14 & 15 Vict. c. 99, rendered it seldom necessary for a defendant to have recourse to a cross bill, it enacting that the parties to any suit, and the persons in whose behalf such suit is brought or defended, shall be competent and compellable to give evidence for any of the parties to the suit. And by stat. 15 & 16 Vict. c. 86, s. 19, any defendant in any suit, without filing any cross bill of discovery, may file interrogatories for the examination of the plaintiff, which interrogatories the plaintiff is bound to answer : (Hallilay's Ch. Suit, 31, 32 and references *supra* ; *et ante*, p. 287.

Q.—What is a bill of revivor ? And state the course to be adopted under the 15 & 16 Vict. c. 86, in cases where a suit becomes abated by death or marriage of parties, or defective by reason of any change or transmission of interest.

A.—A bill of revivor is filed for the purpose of *reviving*, or calling into operation, the proceedings in a suit when from some circumstances (as, for instance, death of a plaintiff) the suit has abated : (Holth. Law Dict.) Under the stat. 15 & 16 Vict. c. 86, upon a suit abating by death, marriage, &c., it is not necessary to exhibit any bill of revivor or supplemental bill in order to obtain the usual order to revive the suit, or carry on the proceedings ; but an order to the effect of the usual order to revive, &c. may be obtained as of course upon an allegation of the abatement of the suit, or of the same having become defective, and of the change or transmission of interest or liability ; and service of such order on the party or parties who under the former practice would be

defendant or defendants to the bill of revivor or supplemental bill, shall bind them in the same manner as if such order had been obtained according to the former practice of the court: (see sect. 52.) But this section has been much narrowed by recent decisions: (see *Dendy v. Dendy*, 28 L. T. Rep. 85; Hallilay's Ch. Suit, 85.)

*Q.*—Does the marriage of a female plaintiff abate the suit?

*A.*—Yes; the marriage of a female plaintiff abates the suit: (Ayck. New Ch. Pr. 293; Hallilay's Ch. Suit, 83, 84; Smith's Ch. Pr. 45, 5th edit.)

*Q.*—Does the marriage of a female defendant abate the suit?

*A.*—No; it is merely necessary to name the husband as well as the wife in the subsequent proceedings: (Ayck. New Ch. Pr. 293; Hallilay's Ch. Suit, 83, 84; Smith's Ch. Pr. 466, 5th edit.) As to abatement of suits by husband and wife, see *ante*, p. 269.

*Q.*—If one of several plaintiffs or defendants respectively to a suit dies *pendente lite*, does the suit abate?

*A.*—If any of the parties to a suit die whose interests are so material as to make it necessary for their representatives to be brought before the court, the suit abates, but not if their interest terminates with them: (Ayck. New Ch. Pr. 292; Hallilay's Ch. Suit, 83; Smith's Ch. Pr. 465, 5th edit.)

*Q.*—Does a suit abate on the death of a party having a joint interest with a co-plaintiff or co-defendant?

*A.*—In such a case the suit will not abate unless he be an accounting party, as his interest survives to the remaining co-plaintiff or co-defendant: (see Ayck. New Ch. Pr. 292; Rede. Pl. 46, 3rd edit.; 3 Ch. Rep. 66; Hallilay's Ch. Suit, 83; Smith's Ch. Pr. 465, 5th edit.)

*Q.*—If a sole plaintiff becomes a bankrupt, what proceeding should a defendant take to free himself from the suit?

*A.*—In such case the defendant should apply on notice, that the assignees may make themselves parties within a given time, or, in default, that the bill may be dismissed: (see Ayck. New Ch. Pr. 255; Hallilay's Ch. Suit, 81; Smith's Ch. Pr. 467, 5th edit.)

*Q.*—Will a suit by a corporate body abate by the death of some of the members of the corporation who are in that character parties by name; and will there be a defect of parties if others, who become members after the commencement of the suit, be not joined?

*A.*—If a suit is instituted by the members of a corporation in their individual characters, it will abate on the death of some of them; and so if other persons become members afterwards, they must be made parties. But if a suit is instituted by a corporate body, and other parties afterwards become members of the same, the suit will not be defective if they are not added: (see Smith's Ch. Pr. 658, 3rd edit.) By the 15 & 16 Vict. c. 86, the practice of setting down a case merely on an objection for want of parties to the suit is abolished: (sect. 43; and see Hallilay's Ch. Suit, 84.)

*Q.*—If in a suit or other proceeding it appears that a deceased person who was interested in the matters in question, has no legal personal representative, has the court any, and what, power of proceeding without requiring letters of administration to be obtained from a Probate Court?

*A.*—By the 15 & 16 Vict. c. 86, s. 44, it is enacted that, if, in any

suit or other proceeding before the court, it shall appear to the court that any deceased person, who was interested in the matter in question, has no legal personal representative, it shall be lawful for the court either to proceed in the absence of any person representing the estate of such deceased person or to appoint some person to represent such estate for all the purposes of the suit or proceeding. This enactment, however, does not apply where the estate to which it is desired to appoint a representative is to be administered by the court, nor to parties against whom a decree is sought personally: (see Ayck. New Ch. Pr. 5; Hallilay's Ch. Suit, 4, 84; Smith's Ch. Pr. 89, 5th edit.)

Q.—Mention the principal cases in which a bill must be accompanied by an affidavit; and how is the omission of such affidavit taken advantage of?

A.—The bill must be accompanied by affidavit in the following cases: 1st. In a bill of interpleader: (see *ante*, p. 288.) 2ndly. In a bill to take testimony *de bene esse*, the application must be supported by affidavit of the facts, such as the age of the witness, and that his evidence is material: (Ayck. New Ch. Pr. 104.) 3rdly. If a bill for discovery of deeds or writings also prays such relief as might have been obtained at law, if the deeds or writings were in the custody of the plaintiff, he must annex to his bill an affidavit that they are not in his custody or power, and that he knows not where they are, unless they are in the hands of the defendant: (*ib.* 204.) So, applications for injunctions before answer, and for writs of *ne exeat regno*, must be supported by affidavit verifying the material allegations in the bill: (*ib.* 216, 218.) The want of the affidavit must be taken advantage of by demurrer: (see 1 Sim. & St. 227; 12 Sim. 35.)

Q.—What are letters missive; what do they require, and how are they obtained?

A.—A letter missive in Chancery is a letter from the Lord Chancellor to the defendant in a suit, such defendant being a peer, informing him that a bill has been filed against him, and requesting him to appear to it: (Holth. Law Dict.) Letters missive are obtained on petition presented to the Lord Chancellor in the usual way; they are granted without any order being drawn up. The letter missive, as also a copy of the petition and a copy of the bill, without any indorsement, must be served upon the defendant or left at his house; and if he neglects to appear within eight days after such service, he is served with a copy of the bill, with an indorsement, stating that his estates will be sequestered if he shall neglect to appear: (see Ayck. New Ch. Pr. 38; Smith's Ch. Pr. 99, 5th edit.)

Q.—When is a bill taken *pro confesso*; and what is the meaning of a bill being so taken?

A.—The cases in which the plaintiff may in future find it necessary to take the bill *pro confesso* against the defendant, are, 1st, when the defendant absconds to avoid process for want of answer; and, 2ndly, when the defendant is taken on process of contempt for want of answer. The meaning of taking a bill *pro confesso* is that the court assumes the statements in the bill to be true, or as confessed (*pro confesso*), and makes a decree accordingly: (Ayck. New Ch. Pr. 59, 60; Hallilay's Ch. Suit, 16.)

Q.—State the practice in procuring the order to take the bill *pro confesso*.

A.—If the defendant has absconded to avoid answer, an order to take the bill *pro confesso* is obtained in the following manner: in the first



place, it is necessary to issue an attachment, and get it returned *non est inventus*; [after which, a notice of motion, either served on the defendant or his solicitor, if he has appeared, or published in the *London Gazette*, if an appearance has been entered for him, in the manner prescribed by Orders 78 and 79, of May 1845, and an affidavit of service, or publication thereof made. An affidavit, to satisfy the court that the defendant is to be deemed to have absconded, must also be prepared, in which the sheriff's officer may depose as to the attempts to execute the attachment. A certificate that an appearance has been entered by or for the defendant, and no answer filed, must also be obtained from the clerk of records and writs. Upon these being handed to counsel he will move the court; and, if the order be granted, it is drawn up in the usual way. If the defendant is taken on process of contempt for want of answer, the 76th Order, May 1845, provides, that upon the execution of an attachment for want of answer against the defendant, or at any time within three weeks afterwards, the plaintiff may cause the defendant to be served with a notice of motion, to be made on some day not less than three weeks after the day of such service, that the bill may be taken *pro confesso* against such defendant; and thereupon, unless such defendant has in the mean time put in his answer to the bill or obtained further time to answer the same, the court, if it thinks fit, may order the bill to be taken *pro confesso* against such defendant, either immediately or at such time and upon such terms as the court may think proper. This application is supported by an affidavit of service of the notice, the sheriff's return, and a certificate of the clerk of records and writs, of no answer filed, must also be produced: (see Ayck. New Ch. Pr. 60 to 62; Hallilay's Ch. Snit, 16 to 18; Smith's Ch. Pr. 128, 129, 5th edit.)

*Q.*—When a defendant is not in custody, can a bill be taken *pro confesso* on motion without setting down the cause, or must the cause be set down for such purpose?

*A.*—By the 81st Order, May 1845, no cause in which an order is made that a bill be taken *pro confesso* against a defendant, is to be heard on the same day on which the order is made; but the cause is to be set down to be heard, and the court, if it thinks fit, may appoint a special day for the hearing thereof: (Ayck. New Ch. Pr. 63; Hallilay's Ch. Suit, 17; Smith's Ch. Pr. 128, 5th edit.)

*Q.*—How does the practice vary when the defendant is in custody?

*A.*—As will be seen, the 81st Order says that *no* cause in which an order is made to take the bill *pro confesso* can be heard on the same day on which the order is made, but must be set down. And this order applies to the practice under the 76th Order of the same general orders of the court, where the defendant, being in custody, is served with notice that the court will be moved that the bill be taken *pro confesso*. The object of the 81st Order was to provide in all cases whatsoever uniformity of practice: (see *Brown v. Home*, 16 L. J. (N. S.) Ch. 177; 8 Beav. 607; and see Ayck. Ch. Pr. 63, 68, 69; Hallilay's Ch. Suit, 17, 18; Smith's Ch. Pr. 128, 5th edit.)

*Q.*—Describe a traversing note, and the effect of it; and state how issue is joined.

*A.*—A traversing note is a note filed by the plaintiff on the defendant's neglecting to plead, answer, or demur (not demurring alone) in due time to any original or supplemental bill, or amended bill, when the plaintiff is in a position to support the allegations in the bill by evidence.

When the traversing note is filed, and a copy served, it has the same effect as if the defendant had filed a full answer or further answer traversing (denying) the whole bill, or such parts of the bill as the note relates to, on the day on which the note was filed: (57th Order, May 1845.) The 15 & 16 Vict. c. 86, s. 26, however, provides, that where a defendant shall not be required to answer, and shall not have answered, the plaintiff's bill, he is to be considered to have traversed the case made by the bill; and, as it is now optional with the plaintiff either to require an answer from the defendant or not, there being nothing to preclude him from proceeding with his suit without answer, the practice with regard to the traversing note would, in effect, seem to be superseded: (See Ayck. New Ch. Pr. 72; Hallilay's Ch. Suit, 18, 19.) Issue is joined by the plaintiff filing a replication to the defendant's answer: (see 93rd Order, May 1845; and *post*, tit. "Replication.")

**Q.**—What is the difference in effect between taking a bill *pro confesso* and filing a traversing note; and to what proceedings at law may they be compared respectively?

**A.**—Taking a bill *pro confesso* has the same effect as if the defendant had admitted the statements in the bill to be true. The filing of a traversing note by the plaintiff makes the defendant, in effect, deny the allegations in the bill. The only proceedings at law to which these proceedings can be compared are interlocutory judgments obtained by the plaintiff for some default by the defendant, and where the claim made by the plaintiff is unliquidated. For both in the case of taking the bill *pro confesso* and filing a traversing note, the orders made on the motion are, as stated above, only preliminary or interlocutory orders, and given because of the defendant's default, and the plaintiff has to set his cause down for a subsequent day, and take such an order as to the court seems just. So on an interlocutory judgment, the plaintiff's right is certainly established; but, unless his demand be for a debt, the amount of damages to which he is entitled must be ascertained, either on a writ of inquiry or before a master.

**Q.**—If a defendant has absconded or refused to obey the process of the court, and an appearance has been entered for him, and he does not afterwards appear in person, or by solicitor, what course should the plaintiff pursue to get on with his suit?

**A.**—He should in such a case obtain an order to have the bill taken *pro confesso*, or file a traversing note: (see *supra*.)

**Q.**—Can a suit be maintained by a plaintiff residing out of the jurisdiction of the court?

**A.**—Yes; but he may be called upon, and compelled, to give security for costs: (see Ayck. New Ch. Pr. 320; Hallilay's Ch. Suit, 93.)

**Q.**—State the principal cases in which equitable relief may be obtained by filing a claim under the orders of April 22, 1850, instead of proceeding by bill.

**A.**—The following are the principal cases in which equitable relief may be obtained by filing a claim instead of a bill: Where the plaintiff is, or claims to be—1. A creditor seeking payment of his debt out of a deceased's personal assets. 2. A legatee seeking payment or delivery of his legacy out of a deceased's personal assets. 3. Next of kin seeking payment of his share of a deceased's personal estate. 4. An executor or administrator seeking to have the deceased's personal estate administered under the direction of the court. 5. A legal or equitable mortgagee

seeking foreclosure, or sale, or otherwise to enforce his security. 6. A mortgagor seeking to redeem. 7. A person seeking specific performance of an agreement, for the sale or purchase of any property. 8. A person seeking an account of partnership dealings after dissolution or expiration. 9. A *cestui que trust* seeking to use the trustee's name in prosecuting an action for his own sole benefit. 10. A person seeking to appoint a new trustee where there is no power in the instrument creating the trusts to appoint new trustees, or where the power cannot be exercised: (Order 1, April 22, 1850). In any other cases, the court may, on an *ex parte* application, give leave for filing a claim: Order 6; and see Ayck. New Ch. Pr. 405, 406; Smith's Ch. Pr. 420, 421, 5th edit.)

Q.—State the general course of proceeding under a claim.

A.—The claim should state the whole subject-matter of complaint; and should claim any special relief intended to be asked for. It is either prepared by the solicitor or by counsel. Claims are to be printed on writing royal paper, quarto, in pica type, leaded; and the copy to be filed is to be interleaved with paper of the same description: (Order 1, Aug. 1852.) In form it is similar to a bill, except that the indorsement commanding the defendant to appear contains no threat of attachment. It must be filed in the record and writs clerk's office: (Order 1, April 1850.) A printed claim must be served on the defendant, properly indorsed and stamped. The claim may be amended the same as a bill (see *post*, "Amendment of Bills"), and a printed copy of the amended claim served upon the defendant or his solicitor. If the defendant does not appear, the court will dispense with his appearance, and, at the time appointed for showing cause, may make an order granting or refusing the relief claimed: (see Order 13, April 1850.) If the defendant appears, he should do so in eight days after being served with the claim, exclusive of the day of service. The defendant may be interrogated in a suit by claim. The claim must be set down for hearing before the judge to whose court the same is attached. Evidence is equally necessary in support of a claim as a bill. On the day for showing cause, the cause is called on and argued by counsel, in the same manner as in a suit by bill, and an order made granting or refusing the relief claimed; and, upon the hearing, the court, if it thinks fit, may require the production and oral examination of witnesses and parties in the cause, and give directions as to the costs occasioned thereby. When the order is made, it is drawn up, passed and entered, and enforced in the same manner as a decree in a suit by bill: (see Ayck. Ch. Pr. tit. "Claim," 6th edit.; Smith's Ch. Pr. tit. "Claim," 5th edit.)

Q.—What is the mode of defence to a claim?

A.—The defendant must first enter an appearance; this must be done within eight days after service of the claim upon him; he then shows cause, if he has any defence, on the fourteenth day after service, or on the seal or motion day then next following, why the plaintiff should not have the relief claimed against him. By consent of the parties, and by leave of the court, cause may be shown on an earlier day: (Ayck. New Ch. Pr. 412, 416; Smith's Ch. Pr. 424, 425, 5th edit.)

Q.—Specify the various matters which must be commenced before a judge at chambers.

A.—They are the following: As to guardianship of infants, except guardians *ad litem*. For the appointment of a special guardian to concur:

in a special case. As to the maintenance and advancement of infants. Under the Drainage Act. For administration of estates under the 15 & 16 Vict. c. 86. Under the Legacy Duty Act for payment of money out of court. ~~For time to plead answer, or demur. For leave to amend bills or claims. For enlarging publication or the time for closing evidence. For production of documents. Relating to the conduct of suits or matters. As to matters connected with the management of property. For payment into court of purchase moneys under sales by order of the court and investing the same. (Judges' Regs. 10th Nov. 1852.)~~ And by an order of 12th Nov. 1856, the following matters are also disposed of at chambers: Applications for payment of the dividends or interest of stocks or funds standing on the credit of any cause or matter depending in the Court of Chancery to the separate account of any person. Applications under sect. 32 of 36 Geo. 3, c. 52, where the amount does not exceed 300*l*. Applications under the 10 & 11 Vict. c. 96, and 12 & 13 Vict., in all cases where the trust fund does not exceed 300*l*. Applications under the Trustees Act 1850 and Amendment Acts, where a decree shall have been made for the sale of lands. Applications under the 12th, 16th and 17th sections of 1 Will. 4, c. 65, where the infant is a ward of court, or the infant's estate, &c. is administered under the direction of the court: (Ord. Nov. 12th, 1856.)

Q.—What relief or benefit is to be obtained by a special case?

A.—A special case is framed to meet cases where no relief was claimed, but the parties merely wished for the opinion of the court, &c. (see 13 & 14 Vict. c. 35); and the powers thus given are further extended by the statute 15 & 16 Vict. c. 86.

Q.—Has the Court of Chancery jurisdiction in any, and what, form of proceeding to declare its opinion upon any, and what, questions, without proceeding to administer relief consequent upon such declaration?

A.—Yes; the 13 & 14 Vict. provides that it shall be lawful for persons interested or claiming to be interested in any question cognizable in the said court as to the construction of any act of Parliament, will, deed, or other instrument in writing, or any article, clause, &c. therein contained, or as to the title, or evidence of title, to any real or personal estate contracted to be sold or otherwise dealt with, or as to the parties to, or the form of, any deed or instrument for carrying any such contract into effect, or as to any other matter within the jurisdiction of equity (except bankruptcy), to concur in stating such question in the form of a special case for the opinion of the court; and the court, upon the hearing thereof, may determine the question raised, without proceeding to administer consequential relief, which declaration is as binding and effective as if made in a suit instituted by bill: (see Ayck. New Ch. Pr. tit. "Special Case;" Smith's Ch. Pr. 431, *et seq.*) And now the 15 & 16 Vict. c. 86, enacts that no suit shall be open to objection on the ground that merely a declaratory decree or order is sought thereby, but that it shall be lawful for the court to make binding declarations of right without granting consequential relief: (sect. 50; Hallilay's Ch. Suit, 65; Ayck. New Ch. Pr. 163; but see hereon, *Jackson v. Turnley*, 17 Jur. 643.)

## APPEARANCE.

*Question.*—How is a defendant brought before the court ?

*Answer.*—A defendant is now brought before the court by being served with a printed bill of complaint, information, ~~or claim~~, properly stamped, and sealed and indorsed, instead of being served with a subpoena to appear, &c. as formerly : (see 15 & 16 Vict. c. 86 ; Ayck. Ch. Pr. 12, 371, 410 ; Smith's Ch. Pr. 96, 5th edit. ; Hallilay's Ch. Suit, 7, 20.)

*Q.*—What time is allowed to a defendant to appear ; and is there any difference in a town and country cause ?

*A.*—The defendant must appear within eight days after being served with a copy of the bill or claim, exclusive of the day of service, whether in a town or country cause : (Ayck. New Ch. Pr. 77 ; Hallilay's Ch. Suit, 20.)

*Q.*—By what process can a defendant who has appeared, be compelled to appear to an amended bill, and how is the process to be served ?

*A.*—A copy of the amended bill, properly stamped, &c., must be served upon the defendant or his solicitor (15 & 16 Vict. c. 86, ss. 8, 67 ; 9th Order, 7th Aug. 1852) ; but where the plaintiff amends his bill before answer filed, the defendant need not enter a fresh appearance to such amended bill : (see Ayck. New Ch. Pr. 24, 76 ; Smith's Ch. Pr. 96, 5th edit.)

*Q.*—Can a plaintiff under any, and what, circumstances make a motion in a suit before the defendant has appeared ?

*A.*—Yes ; as where a grievance sought to be restrained is very pressing, a motion for an injunction may be made for that purpose before appearance of the defendant : (see *ante*, p. 279 ; Ayck. Ch. Pr. 215, 4th edit.) So, a motion for a writ of *ne exeat regno* may be made before appearance : (Ayck. New Ch. Pr. 221 ; see also Order 3, April 1842, which enables the plaintiff to serve the defendant with notice of motion before appearance.)

*Q.*—In what cases may a defendant be bound, upon service of a copy of the bill, by all the proceedings in the cause ?

*A.*—By 23rd Order, Aug. 1841, it was ordered that, where no account, payment, conveyance, or other direct relief was sought against a party to a suit, it should not be necessary for the plaintiff to require such party, not being an infant, to appear to and answer the bill ; but the plaintiff should be at liberty to serve such party with a copy of the bill, whether the same should be an original, amended, or supplemental bill, omitting the interrogating part thereof ; and upon a memorandum of such service being entered at the record and writ clerk's office, and on default of appearance, such party was bound by all the proceedings in the cause. Now, however, by the 15 & 16 Vict. c. 86, a printed copy of the bill is served on all the parties, which bill does not contain any interrogatories ; and only those parties who are required to answer are served with a copy of the interrogatories. Although there is nothing in the foregoing act, and the orders made thereon, actually abolishing the

Orders of Aug. 1841, they will, no doubt, render the practice under them obsolete (a): (see Ayck. Ch. Pr. 12, 13, 79, 4th edit.)

**Q.**—Where a party, defendant, is served with a copy of the bill, and is not required to answer the same; in case such party, defendant, desires the suit to be prosecuted against himself in the ordinary way, what steps must he take, and what is the rule regarding his costs?

**A.**—If the defendant desires to have the suit prosecuted against himself in the ordinary way, he shall be entitled to have it so prosecuted; and in that case he shall enter an appearance in the common form, and the suit shall be prosecuted against him in the ordinary way; but he must pay the costs occasioned thereby, unless the court otherwise order: (see Order 36, Aug. 1841.)

**Q.**—What is the meaning of being in contempt?

**A.**—The meaning of being in contempt is where a party has disobeyed the rules, orders, or process of the court: (Holth. Law Dict.)

**Q.**—In the case of a contempt of the court, how is a party proceeded against?

**A.**—He is proceeded against by—1st. Writ of attachment. 2ndly. Serjeant-at-arms. 3rdly. Sequestration; according to circumstances: (see Ayck. Ch. Pr. 46, 4th edit.; Hallilay's Ch. Suit, 12.)

**Q.**—What is the first thing to be done by a party in contempt, and who wishes to apply to the court on any other subject?

**A.**—He must first clear himself of the contempt, by doing the act for the non-performance of which he is in contempt, before he applies to the court on any other subject: (see Ayck. Ch. Pr. tit. "Process of Contempt," 4th edit.)

**Q.**—How is an appearance enforced?

**A.**—If the defendant, after being served within the jurisdiction with a copy of the bill duly indorsed, &c., ~~does not appear thereto within eight days, the plaintiff may issue an attachment against him. Or he may enter an appearance for him, he not being an infant or person of unsound mind.~~ 1st, as of course, on the expiration of the eight days, and within three weeks after such service; and, 2ndly, on special order, if the three weeks have expired before the plaintiff enters such appearance for the defendant: (see Orders, May 1845; Ayck. New Ch. Pr. 36 to 38; Hallilay's Ch. Suit, 12, *et seq.*; Smith's Ch. Pr. 96, *et seq.* 5th edit.)

**Q.**—Can appearance to a bill in Chancery be enforced against a person residing abroad; and in what cases, and how far, is such appearance conclusive in case of the return of such person to England?

**A.**—It has been already seen that the court may order service of a bill out of the jurisdiction. And upon the expiration of the time (limited by the order) for appearing, the court may, upon the application of the plaintiff, order an appearance to be entered for such defendant. Although an appearance may have been entered for a defendant by the plaintiff, he may, nevertheless, afterwards enter an appearance for himself in the ordinary way; but such appearance by such defendant is not to affect any proceeding duly taken, or any right acquired by the plaintiff under or after the appearance entered by him, or prejudice the plaintiff's right to be allowed the costs of the first

(a) The above question was nevertheless asked at the Hilary Term Examination 1855.

appearance : (see Orders, May 1845; Ayck. Ch. Pr. 42, 43; Hallilay's Ch. Suit. 8, 10.)

Q.—Has a plaintiff any means of enforcing the appearance of a defendant who absconds in order to avoid being served?

A.—By 31st Order, May 1845, it is ordered, that in case it appears to the court that any defendant, <sup>but how been served</sup> (against whom a subpoena to appear to, or to appear and answer, a bill has issued,) has been within the jurisdiction of the court at some time not more than two years before the subpoena was issued, and that such defendant is beyond the seas, or that upon inquiry at his usual place of abode (if he had any), or any place where he was likely to be met with at the time <sup>the bill was</sup> when the subpoena issued, he could not be found so as to be served with process, and that there is ground to believe that he has absconded to avoid service of process, then the court may order that such defendant do appear at a certain day to be named in the order; and a copy of such order, with a notice at the foot of it (stating that if he does not appear pursuant to the notice, the plaintiff may enter an appearance for him, &c.), may, within fourteen days after such order is made, be inserted in the *London Gazette*, and otherwise published as the court directs; and if the defendant makes default, then on poof of the publication of the order and notice, the court may order an appearance to be entered for the defendant on the plaintiff's application (Ayck. New Ch. Pr. 39, 40.) As before seen (*ante*, p. 301), the subpoena to appear is abolished, and the defendant is now served with a copy of the bill duly stamped, sealed and indorsed.

Q.—What is the mode of proceeding against a corporation failing to enter an appearance?

A.—Where a bill was filed against a corporation, instead of proceeding by attachment, the practice was to issue a writ of *distringas*. It is to be observed, however, that the Orders of May 1845, apply to corporate bodies : (Order 4, art. 3.) The *distringas* issues without order, and is made returnable in the same manner as an attachment: (see further Ayck. New Ch. Pr. 57; Smith's Ch. Pr. 120, 5th edit.)

Q.—If the defendant be a peer having privilege of Parliament, what is the process to compel appearance?

A.—He must be first served with a letter missive, &c. (as to the mode of obtaining and serving it, see *ante*, p. 296), and on default of appearance, instead of being proceeded against by the ordinary process of attachment, he is proceeded against by sequestration *nisi* and absolute. An order for this purpose is necessary, which may be obtained on motion as of course; a copy of the order must afterwards be served on the defendant personally. If he neglects to show cause within eight days after service of the order, the plaintiff may move, as of course, to make the sequestration absolute; which being done, the sequestration issues. An appearance may also be entered for him : (Ayck. New Ch. Pr. 54; Smith's Ch. Pr. 120, 5th edit.)

Q.—State the mode of compelling appearance to a bill against a member of Parliament.

A.—After being served with a copy of the bill properly stamped, sealed and indorsed, the process to compel an appearance is by sequestration *nisi* and absolute, as in the case of a peer. An appearance may also be entered for the defendant by the plaintiff: (Ayck. New Ch. Pr. 56, 69; Smith's Ch. Pr. 120, 5th edit.)

## INTERROGATORIES FOR THE EXAMINATION OF THE DEFENDANT.

*Question.*—If an answer be required from a defendant, by what proceedings, to be taken within what period, is such answer to be obtained?

*Answer.*—If an answer be required from a defendant in any suit commenced by bill, the plaintiff must, within eight days after the time limited for the defendant's appearance, file, in the record office of the court, interrogatories for the examination of such defendant, and deliver to him, or his solicitor, a copy thereof; and no defendant is called upon or required to answer, unless interrogatories are so filed and a copy thereof delivered within such eight days. After the eight days have expired, leave must be obtained before the interrogatories can be so filed: (see Ayck. New Ch. Pr. 43, 44, 78; Hallilay's Ch. Suit, 10; Smith's Ch. Pr. 145, 5th edit.)

*Q.*—How soon is the plaintiff entitled to examine the defendant on oath, and how is it to be done? And how is the defendant to know what he is required to answer?

*A.*—The plaintiff may file and deliver interrogatories for the examination of the defendant on oath, within eight days after the time limited for the appearance of such defendant. The interrogatories are filed with the clerks of records and writs. The copies are delivered to the defendant or his solicitor, if he appears by solicitor. The defendant knows what he is to answer from the copy of the interrogatories delivered to him; and the note at the foot of the copy filed also specifies the particular interrogatories which each defendant is required to answer: (see Drewry's Ch. Pr. 10, 11; Smith's Ch. Pr. 121, 5th edit.; Hallilay's Ch. Suit, 10.)

## MODES OF DEFENCE.

*Question.*—State the different modes of defence to a suit in Chancery, and explain the nature of each.

*Answer.*—The defence to a suit in equity may be either by answer, demurrer, plea, or disclaimer: 1st, by answer, controverting the case stated by the plaintiff, the defendant may confess and avoid, or traverse and deny, the several parts of the bill, or, admitting the case made by the bill, may submit to the judgment of the court upon it, or upon a new case made by the answer, or both; 2ndly, by demurrer, he may demand the judgment of the court, whether he shall be compelled to answer the bill or not; 3rdly, by plea, he may show cause why the suit should be dismissed, delayed, or barred; 4thly, by disclaimer, he may terminate the suit by disclaiming all right in the matter sought by the bill; and all or any of these modes of defence may be joined, provided each relates to a separate and distinct part of the bill: (Mit. Plea. 98; Ayck. New Ch. Pr. 72; Hallilay's Ch. Suit, 21.)



Q.—Upon what principle is it decided whether a defence shall be by plea or demurrer?

A.—When a ground of defence is apparent on the bill itself, either from matter contained in it, or from defect in its frame, or in the case made by it, the proper mode of defence is by demurrer. But when the objection, or ground of defence, is *not apparent*, so as to admit of a demurrer, the special matter pleaded must be by plea: (see Ayck. New Ch. Pr. 90, 96; Hallilay's Ch. Suit, 24, 27; Smith's Ch. Pr. 147, 5th edit.)

### 1. Answer.

Q.—Within what period must a defendant required to answer put in his plea, answer, or demurrer?

A.—A defendant who is required to answer must plead, answer, or demur, not demurring alone, within <sup>fourteen</sup> ~~fourteen~~ days after the delivery to him, or his solicitor, of a copy of the interrogatories which he is required to answer; but this time may be enlarged by the court from time to time, upon application: (19th Order, 7th Aug. 1852; Ayck. New Ch. Pr. 81; Smith's Ch. Pr. 143, 5th edit; Hallilay's Ch. Suit, 22.)

Q.—Is it competent for a defendant, not required to answer a bill, to put in his plea, answer, or demurrer thereto; and, if so, within what period must this step be taken by him? (a)

A.—Although an answer is not required from a defendant, he may, without leave of the court, put in his plea, answer, or demurrer, to the bill; but he must do so <sup>within twelve days after appearance.</sup> ~~within twelve days after appearance.~~ After this time leave must be obtained: (see reference, *supra*.)

Q.—Where a defendant is not required to answer interrogatories, what is considered to be the effect of not putting in a voluntary answer?

A.—The 15 & 16 Vict. c. 86, s. 26, enacts that where a defendant shall not have been required to answer, and shall not have answered, the plaintiff's bill, he shall be considered to have traversed the case made by the bill; the plaintiff will, therefore, have to prove his whole case, and issue is to be joined by filing replication: (28th Order, 7th Aug. 1852; Drewry's Ch. Pr. 36; Hallilay's Ch. Suit, 18.)

Q.—If further time be required to answer, what proceeding is necessary to obtain it?

A.—Further time to plead, answer, or demur is now obtained from a judge at chambers; for which purpose a summons must be taken out. The application should be supported by affidavit showing sufficient cause and due diligence: (see 15 & 16 Vict. c. 85, s. 26; Ayck. Ch. Pr. 82; Hallilay's Ch. Suit, 22; Smith's Ch. Pr. 144, 5th edit.)

Q.—If the plaintiff should amend his bill, what time has the defendant to put in his answer to such amended bill?

A.—The defendant has the same time to answer an amended bill as to answer an original bill: (see Ayck. Ch. Pr. 81; Smith's Ch. Pr. 143, 5th edit.)

Q.—What is the last day which the defendant has for putting in an answer to the amendments of a bill, before a replication can be filed,

(a) Also asked in this form: If no interrogatories be filed requiring an answer by a defendant to a bill, is he at liberty within any, and what, time to put in a voluntary answer?

where the plaintiff has amended on the terms of not requiring a further answer ?

*A.*—By the 39th Article, 16th Order of May 1845, it was ordered, that where the plaintiff amends his bill without requiring an answer to the amendments, and no answer is put in thereto, and no warrant for further time to answer the same is served *within eight days* after service of the notice of the amendment of such bill (now, eight days after service of a copy of the amended bill), the plaintiff is, after the expiration of such eight days, but within fourteen days from such service, either to file his replication, or to set down the cause to be heard on bill and answer, otherwise any defendant may move to dismiss for want of prosecution. By this order the defendant has eight days after being served with a copy of the amended bill, either to put in his answer, or obtain further time to do so, before the plaintiff can file a replication, when not required to answer the amendments : (see Ayck. Ch. Pr. 117, 4th edit.)

*Q.*—What is the practice as to a defendant answering the interrogatories of a bill ?

*A.*—As before seen, a bill does not now contain any interrogatories ; but if the plaintiff requires an answer from the defendant, he delivers to him interrogatories, and unless these interrogatories be delivered, the defendant need not put in any answer to the bill : (see Ayck. Ch. Pr. 43, 5th edit. ; Hallilay's Ch. Suit, 6, 10, and as to the time for filing and delivering these interrogatories, and putting in an answer thereto, see *ante*.)

*Q.*—Must the defendant answer in all cases upon oath ; or in what cases may the oath or signature be dispensed with ?

*A.*—As a general rule, the answer of the defendant must be put in on oath, and signed by him, but the answer may, if the plaintiff is willing to consent, be taken without the oath, or without the oath and signature of the defendant. This consent is to be signed by the solicitor : (Ayck. New Ch. Pr. 89 ; Hallilay's Ch. Suit, 22, 23 ; Smith's Ch. Pr. 172, 5th edit.)

*Q.*—Before whom can answers be sworn to ?

*A.*—Answers may be sworn before commissioners to administer oaths in Chancery (see 16 & 17 Vict. c. 78), and before the clerks of records and writs, or before the clerk of enrolments in Chancery, as occasion may require for the better despatch of business : (7th Order of 26th Oct. 1842 ; and see Ayck. New Ch. Pr. 84 ; Hallilay's Ch. Suit, 23 ; Smith's Ch. Pr. 164, 5th edit.)

*Q.*—An answer serves two distinct purposes ; what are they ?

*A.*—1. It furnishes the result of an examination of the defendant, on oath, upon the interrogatories. 2. It informs the plaintiff and the court of the nature of the defence upon which the defendant means to rely.

*Q.*—What is the proper proceeding to compel an answer ?

*A.*—If after the defendant has been served with the copy, bill and interrogatories, he does not answer in due time after an appearance has been entered by or for him, he is in contempt, and the plaintiff may proceed against him by attachment, and he may be committed to prison and brought to the bar of the court. And the plaintiff may have an order to take the bill *pro confesso* : (see Ayck. New Ch. Pr. 46, *et seq.* ; Hallilay's Ch. Suit, 12, *et seq.* ; Smith's Ch. Pr. 123, 5th edit.)

*Q.*—When will an answer be deemed sufficient ?

A.—An answer will be deemed sufficient if the plaintiff does not file exceptions thereto within six weeks after the filing of such answer. 2. If exceptions being filed, the plaintiff does not set them down for hearing within fourteen days after the filing thereof. 3. If within fourteen days after the filing of a further answer the plaintiff does not set down the old exceptions. 4. If upon the hearing of exceptions, the answer is held sufficient; and in this case it is so from the date of the order made on the hearing: (Orders, Nov. 1850; Ayck. New Ch. Pr. 108; Hallilay's Ch. Suit, 33; Smith's Ch. Pr. 184, 5th edit.)

Q.—What is the difference between an evasive and insufficient answer, and how are they respectively treated?

A.—An evasive answer is where the defendant merely answers the charges literally, without confessing or traversing the subject of each interrogatory. If the answer is so evasive as to amount to no answer at all, it will be ordered to be taken off the files of the court: (Story's Eq. Plea. § 852.) An insufficient answer is where the defendant does not fully answer the interrogatories in the bill. The plaintiff should except to an insufficient answer: (Ayck. New Ch. Pr. 107; Smith's Ch. Pr. 184, 5th edit.; Hallilay's Ch. Suit, 33.)

Q.—Within what time must the plaintiff except to the answer of a defendant; and if the plaintiff do not pursue that remedy within the proper time, what is the consequence?

A.—The plaintiff must except to the defendant's answer within six weeks after the filing of such answer, or it will be deemed sufficient: (see references, *supra*.)

Q.—If exceptions be taken to an answer for insufficiency, how should a defendant proceed to avoid their being set down for hearing, and within what time should he do so?

A.—If exceptions be taken to a defendant's answer for insufficiency, he must, in order to avoid their being set down for hearing, submit thereto within eight days after the filing of such exceptions: (9th Order, Nov. 1850; Hallilay's Ch. Suit, 34; Smith's Ch. Pr. 181, 5th edit.)

Q.—When must a plaintiff, who has delivered exceptions to a defendant's answer for insufficiency, obtain an order to set down for hearing such exceptions, if the bill be for an injunction?

A.—The plaintiff, having shown exceptions to a defendant's answer for insufficiency as cause against dissolving an injunction, is to set down such exceptions for hearing at the latest on the day next after showing such exceptions as cause. If he does not, the injunction is dissolved: (15th Order, Nov. 1850; Ayck. New Ch. Pr. 220.)

Q.—When a defendant is required to put in a further answer, in consequence of exceptions to his first answer having been allowed or submitted to, what time is he allowed to put in such further answer?

A.—If a defendant, not being in contempt, submits to exceptions to his answer for insufficiency *before* the plaintiff has set them down for hearing, he is allowed three weeks from the date of the submission within which he is to put in his further answer to the bill: (10th Order, 1850.) After exceptions to an answer for insufficiency are set down for hearing, if a defendant, not being in contempt, submits to answer, or the court holds the answer to be insufficient, the court may in such cases appoint the time within which such defendant is to put in his further answer;

(17th Order, 1850 ; see Ayck. New Ch. Pr. 109, 111 ; Hallilay's Ch. Suit, 36 ; Smith's Ch. Pr. 143, 5th edit.)

Q.—State the different ways in which a plaintiff tacitly waives his right to except to an answer for insufficiency.

A.—1. By obtaining an order to amend his bill. 2. By not excepting within the proper time, viz., six weeks after the answer is filed. 3. By filing a replication : (see Smith's Ch. Pr. 142, 5th edit. ; Hallilay's Ch. Suit.)

Q.—What is the meaning of an answer being impertinent ; and when considered to be so by the plaintiff, what course should he adopt ?

A.—An answer is said to be impertinent when stuffed with long recitals, or with long digressions on matters of fact, which are altogether unnecessary and totally immaterial to the point in question : (Ayck. New Ch. Pr. 264 ; Hallilay's Ch. Suit, 37.) Formerly, if an answer was impertinent, the plaintiff used to except to it ; but now, by the 15 & 16 Vict. c. 86, s. 17, the practice of excepting to answers and other proceedings in the court for *impertinence* is abolished ; but the plaintiff may have the impertinent matter expunged, and the court may order the costs occasioned by such impertinent matter being introduced into any pleadings to be paid by the party introducing the same, upon application being made for that purpose : (see Ayck. New Ch. Pr. 264, 266 ; Hallilay, *ubi sup.* ; Smith's Ch. Pr. 515, 5th edit.)

Q.—Where it is apprehended a defendant is likely to abscond in order to avoid answering, what mode of proceeding is to be adopted in such case, and by whom ?

A.—If there is just reason to believe that any defendant means to abscond before answering the bill, the court may, on the *ex parte* application of the plaintiff, at any time after an appearance has been entered for such defendant by the plaintiff, order an attachment for want of answer to issue against him : (72nd Order, May 1845.) Under the new practice it may be doubtful whether the court will proceed under this order until after the defendant has been served with a copy of the interrogatories : (Ayck. Ch. Pr. 50, 4th edit.)

Q.—Where an attachment has issued against a defendant for want of answer, and the defendant not having been taken on such attachment, the same has been returned *non est inventus*, in what manner should the plaintiff proceed to obtain a sequestration ?

A.—On the sheriff's return of *non est inventus* to an attachment issued against a defendant for not answering the bill, and upon affidavit made that due diligence was used to ascertain where such defendant was at the time of issuing such writ, and in endeavouring to apprehend such defendant under the same, and that the person suing forth such writ verily believed, at the time of suing forth the same, that such defendant was in the county into which such writ was issued, the plaintiff shall be entitled to a writ of sequestration in the same manner that he is now entitled to such writ, upon the like return made by the serjeant-at-arms : (9th Order, 26th Aug. 1841 ; Ayck. New Ch. Pr. 53 ; Hallilay's Ch. Suit, 15.)

Q.—If a defendant be in prison under an attachment for not answering, is it incumbent on the plaintiff to take any, and if any, what step ; if he does not take such step, what is the consequence ?

A.—If a defendant be in prison under, or being already in prison be detained under, an attachment for not answering, and be not brought to

the bar of the court within the proper time, he is to be discharged from custody without payment of the costs of his contempt: (74th Order, May 1845, and see 1 Will. 4, c. 36, s. 15, r. 5; Ayck. New Ch. Pr. 52; Hallilay's Ch. Suit, 13, 14; Smith's Ch. Pr. 110, 5th edit.)

Q.—In what case is the signature of counsel to an answer unnecessary?

A.—As before stated, the name of counsel must appear upon the answer. But the name of counsel is not required to an answer and examination to interrogatories settled by the judge or the master: (Braithwaite's Record and Writ Pract. 45.) So before commissions to take answers, &c. were abolished, if the answer was taken by commission in the country, counsel's signature to the answer was unnecessary: (Ayck. New Ch. Pr. 83, 4th edit.)

Q.—If a defendant be a peer having privilege of Parliament, or a member of the House of Commons, what is the process in each case to compel answer?

A.—By orders *nisi* and absolute for a sequestration, as in case of default of appearance: (see *ante*.) As soon as the plaintiff has obtained the order for the sequestration, he may move to have the bill taken *pro confesso* against the defendant: (See Ayck. New Ch. Pr. 57, 69; Smith's Ch. Pr. 134, 5th edit.)

Q.—How is a corporation compelled to answer?

A.—By writ of *distringas*. Upon the return of this writ, an *alias distringas* and then a *pluries* is issued, and upon the return of the latter, if default is made, a sequestration issues in the usual way; after which the bill may be taken *pro confesso*: (Ayck. New Ch. Pr. 57.) A bill may, however, be taken *pro confesso* against a corporation: (Smith's Ch. Pr. 128, 5th edit.)

Q.—Can a defendant, after a traversing note has been filed, put in an answer as of course; or, if desirous to answer, what steps must he take?

A.—After a traversing note has been filed, and a copy thereof served, a defendant is not at liberty to plead answer, or demur to a bill, or to put in any further answer thereto, without the special leave of the court: (58th Order, May 1845; Ayck. Ch. Pr. 75, 4th edit.)

Q.—In answering a bill, can a defendant introduce into his answer any other matter than that inquired of by the interrogatories?

A.—Yes; the answer of a defendant to any bill of complaint may contain not only the answer of the defendant to the interrogatories filed, but such statements material to the case as the defendant may think it necessary or advisable to set forth therein: (15 & 16 Vict. c. 86, s. 14; Ayck. New Ch. Pr. 83; Hallilay's Ch. Suit, 21; Smith's Ch. Pr. 163, 5th edit.)

## 2. Demurrer.

Q.—Explain the nature and effect of a demurrer.

A.—A demurrer in equity amounts to an admission of the truth of the plaintiff's bill, or of that portion of it to which the demurrer refers, but insists upon some defect or objection apparent on the face of it, either from matter contained in it, or from defect in its frame, or in the case made by it, and prays the judgment of the court whether the defendant can be compelled to answer the plaintiff's bill: (see Holth. Law Dict.;

Ayck. New Ch. Pr. 90, *et seq.*; Smith's Ch. Pr. 14, 5th edit.; Hallilay's Ch. Suit, 24.) Demurrers are either general, that is, to the whole bill, or special, as where particular imperfections are pointed out: (see reference *supra*.)

Q.—Must a demurrer be put in on oath or not?

A.—No; a demurrer does not require to be either sworn to or signed by the defendant: (Ayck. New Ch. Pr. 92; Hallilay's Ch. Suit, 25; Smith's Ch. Pr. 148, 5th edit.)

Q.—What time is given to a defendant after appearance to demur to a bill?

A.—A defendant must demur *alone* to any bill within twelve days after his appearance thereto, and not afterwards: (16th Order, May 1845.) The days are reckoned exclusive of the day of entering the appearance: (Ayck. New Ch. Pr. 81; Hallilay's Ch. Suit, 25; Smith's Ch. Pr. 148, 5th edit.)

Q.—Can a defendant demur to part only of a bill?

A.—Yes; for by Order 36, Aug. 1841, no demurrer is to be held bad, and overruled upon argument, only because such demurrer shall not cover so much of the bill as it might by law have extended to: (see Ayck. New Ch. Pr. 90, 91; Hallilay's Ch. Suit, 24.)

Q.—Can a demurrer be set down for hearing by the plaintiff or the defendant, or by both equally; and within what time; and is there any difference if the demurrer is to the whole or part of the bill?

A.—Upon the filing of a demurrer by a defendant, *either party may* set the same down for argument immediately: (44th Order, May 1845.) And within twelve days after the filing of a demurrer to the *whole bill*, the plaintiff, desiring to submit the same to the judgment of the court, is to cause it to be set down for argument. If he does not, such demurrer is to be held sufficient, and the plaintiff to be held to have submitted thereto: (16 *id.* art. 17, and see 46, *id.*) Within three weeks after filing a demurrer to *part of a bill*, the plaintiff desiring to submit such demurrer to the judgment of the court, is to cause the same to be set down for argument. If he does not, such demurrer is to be held sufficient, and the plaintiff is to be held to have submitted thereto: (16 *id.* art. 18, and see 47 *id.*, and see generally Ayck. New Ch. Pr. 93; Hallilay's Ch. Suit, 25; Smith's Ch. Pr. 150, 5th edit.)

Q.—What effect has the overruling of a demurrer on the future defence of the party filing it?

A.—If a demurrer be overruled, the defendant cannot put in another demurrer; neither can he put in a plea; but where a demurrer to an *original* bill is overruled, the defendant may still demur to an *amended* bill. Upon a demurrer being overruled, the defendant should immediately apply to the court for time to answer: (Ayck. New Ch. Pr. 96; Hallilay's Ch. Suit, 26, 27; Smith's Ch. Pr. 152, 5th edit.)

Q.—What is the difference in effect of the allowance of a partial demurrer, and that of a general demurrer?

A.—Where a partial demurrer is allowed, the court frequently gives the plaintiff leave to amend his bill, on payment of the defendant's costs. If a general demurrer is allowed, it puts an end to the suit: (Ayck. New Ch. Pr. 95; Smith's Ch. Pr. 152, 153, 5th edit.; Hallilay's Ch. Suit, 27.)

3. *Plea.*

*Q.*—Explain the nature and effect of a plea.

*A.*—A plea is special matter pleaded by the defendant to a bill, on which an objection is not apparent, so as to admit of a demurrer. A plea in effect admits the truth of the plaintiff's bill, but shows cause why the suit should be dismissed, delayed, or barred. Pleas are generally considered as of three sorts: to the jurisdiction of the court; to the person of the plaintiff or defendant; and in bar of suit: (Ayck. New Ch. Pr. 78, 26; Hallilay's Ch. Suit, 27; Smith's Ch. Pr. 154, 5th edit.)

*Q.*—Must a plea be put in upon oath, or not?

*A.*—Pleas in bar of matters *in pais*, such as an award, a release, or a will, must be put in upon oath of the defendant; but pleas to the jurisdiction of the court, or in disability of the person of the plaintiff or defendant, or pleas in bar of any matter of record, need not be put in upon oath: (Ayck. New Ch. Pr. 98; Hallilay's Ch. Suit, 28; Smith's Ch. Pr. 155, 5th edit.)

*Q.*—When must a plea be accompanied by answer?

*A.*—If the bill contains any charge which in equity may operate in favour of the plaintiff's case against the matter pleaded, as fraud or notice of title, the charge must be denied by way of answer, as well as by averment in the plea. In this case the answer will not support the plea unless it be full and clear: (Goldsmith's Eq. Pr. 303, 4th edit.)

*Q.*—If a plea be filed which, though good in point of form and substance, is untrue in fact, what course ought a plaintiff to take thereupon?

*A.*—The plaintiff may take issue upon it, which is done by replying thereto: (Ayck. New Ch. Pr. 100; Hallilay's Ch. Suit, 29; Smith's Ch. Pr. 157, 5th edit.)

*Q.*—If a defendant files a plea, and before the same be set down for argument the plaintiff replies thereto, is such plaintiff confined to disputing the truth of the plea, or can he afterwards dispute its validity?

*A.*—Where the plaintiff has filed his replication to a plea he may dispute the truth of the plea, but he cannot dispute its validity: (Goldsmith's Eq. Pr. 304; Smith's Ch. Pr. 158, 5th edit.)

*Q.*—Is the objection for want of parties to a bill taken in the same manner where such objection appears on the face of the bill itself, as when it does not so appear? If different, then state what are the proper modes of objection applicable to each of these two cases.

*A.*—If the objection for want of parties to a bill appears on the face of the bill, the proper mode of objection applicable is by demurrer; but if the objection does not appear on the face of the bill, a plea is the proper remedy: (see *ante*.) But by the 15 & 16 Vict. c. 86, it is not now competent for the defendant to set down the cause for argument merely on an objection for want of parties to the suit. And where a person who was interested in the subject-matter of the suit or proceeding is dead, leaving no legal personal representative, the court has power to appoint one if necessary, or proceed in the absence of one. So the court is empowered to adjudicate on questions arising between parties, notwithstanding they may be some only of the parties interested in the property respecting which the question may have arisen: (see ss. 43, 44, 51; see also sect. 42 and rules thereon, and Hallilay's Ch. Suit, tit. "Parties to Suits.")

4. *Disclaimer.*

*Q.*—If a defendant claims no right or interest in the property or thing claimed by the plaintiff, how should the defendant proceed, and within what time should he take the necessary step?

*A.*—In such case the defendant should put in a disclaimer: (Ayck. Ch. Pr. 102; Hallilay's Ch. Suit, 31, and see *ante.*) The time for putting in a disclaimer was formerly six weeks after appearance; and the new acts and orders do not seem to have altered this period. But, as a disclaimer can scarcely ever be put in alone, and must be accompanied by an answer, the same time is allowed to disclaim as to answer: (see Hallilay's Ch. Suit, 31, and the authorities there referred to; also Smith's Ch. Pr. 177, 5th edit.)

## AMENDMENT OF BILL.

*Question.*—If from the answer or otherwise, matters should arise not comprised in the plaintiff's bill, and of service to his suit, what step must he take?

*Answer.*—He must amend his bill: (Ayck. New Ch. Pr. 15; Hallilay's Ch. Suit, 38.)

*Q.*—State what matters, arising after filing a bill, can be introduced on the record by means of an amended bill.

*A.*—As an original and an amended bill are considered but as one record, formerly nothing could be introduced by way of amendment which did not take place previously to filing the original bill; anything occurring subsequently must have been brought before the court, either by supplemental bill or bill of revivor. It is not now necessary, however, to exhibit any supplemental bill merely to state or put in issue facts or circumstances occurring after the institution of any suit; but they may be introduced into the original bill by way of amendment, if the cause is otherwise in such a state as to allow of an amendment being made in the bill; and if not, the plaintiff is to be at liberty to state the same, and put the same in issue, by filing in the record and writ clerks' office a written or printed statement, to be annexed to the bill; and such proceedings by way of answer, evidence, and otherwise, are to be had and taken upon the statement so filed as if the same were embodied in a supplemental bill: the court may make such orders accelerating the proceedings as may appear just and practicable: (15 & 16 Vict. c. 86, s. 53, 44th Order, 7th Aug. 1852; Ayck. New Ch. Pr. 15, 297, 298; Hallilay's Ch. Suit, 38; Smith's Ch. Pr. 186, 5th edit.)

*Q.*—What are the restrictions imposed on a plaintiff with regard to amending his bill?

*A.*—The amendments must not be of such a character as to entirely change the nature of the suit. A plaintiff cannot, under an order to amend generally, strike out a co-plaintiff's name. So the court, at the hearing, will not allow the plaintiff to amend his bill so as to raise a different case from that on which he had previously relied, and which



was properly put in issue by the pleadings : (see further Ayck. New Ch. Pr. 15, 16; Hallilay's Ch. Suit, 39; Smith's Ch. Pr. 186, 187, 5th edit.)

*Q.*—Under what circumstances can a plaintiff desirous to amend his bill obtain an order as of course for leave to amend ; and if he applies for a special order, what is the effect of the affidavit he must make ?

*A.*—An order for leave to amend a bill may be obtained at any time before answer, upon motion or petition as of course : (64th Order, May 1845.) And this order may be obtained as often as is pleased. And in cases where there is a sole defendant, or where there being several defendants, they all join in the same answer, the plaintiff may, after answer and before replication, or undertaking to reply, obtain one order of course for leave to amend his bill, at any time within four weeks after the answer is deemed or found to be sufficient : (16 *id.* art. 32.) In cases where there are several defendants who do not join in the same answer, the plaintiff (if not precluded from amending, or limited as to the time of amending, by some former order) may, after answer and before replication, or undertaking to reply, at any time within four weeks after the last answer is deemed or found to be sufficient, obtain one order of course for leave to amend his bill: (16 *id.* art. 33.) A special order (which is obtained on summons at chambers). for leave to amend a bill is not to be granted without affidavit to the effect—1st, that the draft of the proposed amendments has been settled, approved and signed by counsel ; and, 2ndly, that such amendment is not intended for the purpose of delay or vexation, but because the same is considered to be material to the plaintiff's case : (67 Order; May 1845.) After the plaintiff has filed or undertaken to file a replication, or after the expiration of four weeks from the time the answer or last of answers is deemed sufficient, a special order for leave to amend the bill is not to be granted without further affidavit showing that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into such bill : (68 *id.*, and see generally Hallilay's Ch. Suit, 41 ; Ayck. New Ch. Pr. 16, &c.)

*Q.*—If a defendant file an answer to the plaintiff's bill without being required to do so, what time has the plaintiff to amend his bill as of course ?

*A.*—If the defendant file an answer to the plaintiff's bill without being required to do so, the plaintiff can only obtain an order of course to amend his bill within four weeks from the time of filing the answer : (*Rogers v. Fryer*, 2 Week. Rep. 67.)

*Q.*—To whom must a plaintiff apply for an order to amend ?

*A.*—If the order may be obtained as of course, as above seen, it is obtained on motion or petition, granted as of course : (see Hallilay's Ch. Suit, 39, 40.) If, however, the order cannot be obtained as of course, then by Judges' Regs. of 10th Nov. 1852, the application is to be made at chambers upon summons : (see 15 & 16 Vict. c. 80 ; Judges' Reg. 10th Nov. 1852 ; Hallilay's Ch. Suit, 39 to 41 ; Smith's Ch. Pr. 190, 5th edit. *et supra.*)

*Q.*—What will be the consequence to the plaintiff if he neglects to amend within the time allowed ?

*A.*—Where the plaintiff obtains an order for leave to amend his bill, and does not amend the same within the time limited for that purpose, the order to amend becomes void, and the cause as to dismissal stands in the same situation as if such order had not been made : (70th Order,

May 1845; Ayck. New Ch. Pr. 22.; Hallilay's Ch. Pr. 42 ; Smith's Ch. Pr. 191, 5th edit.)

**Q.**—When a plaintiff has sued out an attachment against a defendant for want of answer, can he amend his bill without waiver of the pending proceedings of the contempt ?

**A.**—The amendment of a bill in general puts an end to all process of contempt, for want of appearance or answer. By the 1 Will. 4, c. 36, rule 10, however, it is enacted, that where the defendant has been brought to the bar of the court for his contempt in not answering, and refuses or neglects to answer (not being an idiot, lunatic, or of unsound mind), the court may, upon motion or petition, of which personal notice must be given to the defendant, authorise the plaintiff to amend his bill, without such amendment operating as a discharge of the contempt, or rendering it necessary to proceed with process of contempt *de novo* ; but after such amendment the plaintiff may proceed to take the amended bill *pro confesso*, as if it had not been amended : (Ayck. New Ch. Pr. 24, 25; Hallilay's Ch. Suit, 42, 43.)

**Q.**—What is the effect of a plaintiff amending his original bill before answering a cross bill ?

**A.**—When a cross bill is filed, the plaintiff in the original cause is entitled to have an answer to his bill before he can be compelled to answer the cross bill ; but if the plaintiff in the original cause amends his bill after the filing of the cross bill, he loses his right to priority of answer : (see Ayck. New Ch. Pr. 208, 209 ; Smith's Ch. Pr. 447, 5th edit.)

**Q.**—If a plaintiff changes his residence after the filing of the bill, and then amends, what is his duty with respect to such change, and what is the consequence of neglecting it ?

**A.**—If a plaintiff changes his residence after filing his bill, and then amends, he should describe himself as of his new residence, otherwise the defendant may, if the misdescription is wilful, obtain security for costs : (see *Hurst v. Padwick*, 17 L. J. (N.S.) Ch. 169; 12 Jur. 21; Ayck. New Ch. Pr. 321; Hallilay's Ch. Suit, 93 ; see also *Oldale v. Whitehead*, 32 L. T. Rep. 269.)

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## REPLICATION.

**Question.**—What must be done on the part of a plaintiff in order to bring his cause to issue against the defendant ?

**Answer.**—He must file a replication : (Ayck. New Ch. Pr. 116, 121 ; Hallilay's Ch. Suit, 45 ; Smith's Ch. Pr. 214, 5th edit.)

**Q.**—What effect has the filing of a replication on the answer of a defendant ?

**A.**—The effect of replication is to deny generally the truth of the defendant's answer, and to put him to the proof of the allegations in it : (Hallilay's Ch. Suit, 45.) Also by replying to the answer, the plaintiff

deprives the defendant of the power of reading it as evidence in support of his own cause until proved, but the plaintiff does not thereby preclude himself from reading the answer against the defendant: (Ayck. New Ch. Pr. 116; Hallilay's Ch. Suit, 45; Smith's Ch. Pr. 214, 5th edit.)

*Q.*—What is the effect of not replying to a defendant's answer?

*A.*—If the answer is not replied to, it is an admission by the plaintiff, if of age, of the facts therein stated, and it is evidence for the defendant in support of his cause: (Ayck. *ubi sup.*) And if the plaintiff does not either obtain an order to amend his bill, or file his replication, or set down the cause on bill and answer, within four weeks after the last answer is deemed or found to be sufficient, the defendant may move to dismiss the suit: (16th Order, May 1845, art. 37; 114 *id.* art. 1; and see Ayck. Ch. Pr. 117, 122, 4th edit.)

*Q.*—Can replication be dispensed with when an adverse decree is sought by evidence to contradict the defence?

*A.*—Yes; on a motion for decree: (see further *post*, tit. "Decree.")

## EVIDENCE.

*Question.*—How must the parties to a suit in equity proceed for the purpose of proving such facts of the case as are not admitted?

*Answer.*—They must prove the facts which are not admitted by the evidence of witnesses: (Ayck. Ch. Pr. 116, 122, 4th edit.; Hallilay's Ch. Suit, 46, 47.)

*Q.*—State the modes in which evidence may now be taken in suits commenced by bill.

*A.*—Evidence in the Court of Chancery may now be taken either orally before <sup>the court, either hearing or before a jury</sup> examiners or upon affidavits: (15 & 16 Vict. c. 86.) (It is not now competent, as formerly (see 15 & 16 Vict. c. 86, s. 29; 31st Order, 7th Aug. 1852), for the plaintiff or defendant to require by notice; or otherwise, that the evidence to be adduced in a cause shall be taken orally) but, when issue shall have been joined, the plaintiff and defendant respectively shall be at liberty to verify their respective cases either wholly or partially by affidavit, or wholly or partially by oral examination of witnesses, before an examiner of the court or an examiner specially appointed: (4th Order, Jan. 1855.) When the evidence is taken orally, the witnesses are examined by an examiner <sup>or a jury - so one has decided</sup> in the presence of the parties, their counsel, solicitors, or agents, ~~and the witnesses are subject to cross-examination and re-examination.~~ The depositions are to be taken down in writing in the form of a narrative, and, when completed, are read over to the witness, who is to sign the same in the presence of the parties, but, in case of refusal, the examiner is to sign the same; and in all cases the examiner may state any special matter he may think fit. The original depositions, authenticated by the examiner's signature, are to be transmitted to the Record Office and there filed, and any party to the suit may have a copy of them on paying the proper fees: (see further 15 & 16

Vict. c. 86, s. 28, 31, 32, 33, 34 ; Hallilay's Ch. Suit, 53, 54 ; see also Smith's Ch. Pr. 235, 5th edit.)

Q.—What advantage in respect of evidence has a plaintiff in equity compared with one at common law ?

A.—A plaintiff in equity has now no advantage in respect of evidence with one at common law, as a plaintiff at law can have a defendant examined on oath (14 & 15 Vict. c. 99), and may also obtain a discovery on oath from the defendant (17 & 18 Vict. c. 125), which he could not formerly have done, but must have gone into a court of equity for that purpose : (see *ante*, pp. 226, 285.)

Q.—Are there any cases in which one party may examine another party to a suit as a witness ? If so, give instances in which such examination can take place, and to what extent it will be permitted.

A.—By the 14 & 15 Vict. c. 99, it is enacted, that on the trial of any issue joined, or of any matter or question, or any inquiry arising in any suit, &c. in any court of justice, or before any persons having by law, or by consent of parties, authority to hear, receive and examine evidence, the parties thereto, and the persons in whose behalf any such suit, &c. may be brought or defended, shall, except as thereafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition according to the practice of the court, on behalf of either or any of the parties to the suit, &c. : (sect. 2.) But nothing therein contained shall render any person compellable to answer any question tending to criminate himself or herself : (sect. 3 ; and see Hallilay's Ch. Suit, 31, 32 ; Smith's Ch. Pr. 223, 5th edit.)

Q.—Can a defendant in a suit be examined as a witness on behalf of a co-defendant in the same suit, and under what authority ?

A.—A defendant may be examined as a witness for a co-defendant by the joint operation of the 6 & 7 Vict. c. 85, s. 1, and the 14 & 15 Vict. c. 99, s. 2 : (see references *supra*.)

Q.—In what cases is the answer of a defendant evidence for himself ?

A.—If the plaintiff does not reply to the defendant's answer, it is evidence for the defendant (Ayck. Ch. Pr. 122, 4th edit. ; Hallilay's Ch. Suit, 45, 47 ; Smith's Ch. Pr. 220, 5th edit. ; and see *ante*, p. 315) ; or if the defendant after replication verifies his answer by affidavit, it is evidence for himself : (Smith's Ch. Pr. 390, 6th edit.)

Q.—Can the statements in the answer of one defendant be read and used by the plaintiff at the hearing of the cause against any other defendant : if they cannot, is there any mode by which the plaintiff can make use of statements within the knowledge of one defendant against another defendant ; and if there is, how is it to be accomplished ?

A.—The answer of one defendant cannot be read against a co-defendant, except in an interpleader suit : (Ayck. New Ch. Pr. 122 ; Hallilay's Ch. Suit, 47.) As to reading the answer to a cross bill, see *ante*, p. 288. But, as before seen, the plaintiff may compel a defendant to give evidence as a witness, and so obtain the statements within his knowledge : (6 & 7 Vict. c. 85, s. 1, and 14 & 15 Vict. c. 99, *supra*.)

Q.—After an answer has been put in, can a plaintiff at law select part of the answer to read as evidence at law, or can the defendant at law insist that the whole should be read ?

A.—The plaintiff at law cannot select a part of the answer to be read

as evidence at law, but the whole must be read : (see Roscoe on Ev. 105, 3rd edit. ; Taylor on Ev. 479, 1152 ; Hallilay's Ch. Suit, 48.)

**Q.**—What are the modes by which the execution of deeds or the handwriting of letters may, according to the ordinary rule of courts of equity, be proved for the purpose of being given in evidence on the hearing of the cause ?

**A.**—Deeds, &c., which require proof of their execution by a subscribing witness, or letters, &c. of which proof must be made of the handwriting of the persons writing or subscribing the same, are all considered as exhibits, and may be proved *vivâ voce* or by affidavit : (Ayck. Ch. Pr. 125, 4th edit. ; Hallilay's Ch. Suit, 48.) An order, which is an order of course, is first necessary : (Smith's Ch. Pr. 255, 5th edit.)

**Q.**—Where written documents requiring proof of execution have not been proved before the closing of evidence in a suit, can they be proved afterwards, and how ?

**A.**—Where written documents have been neglected to be proved before the closing of evidence in the suit, or where the plaintiff proceeds to a hearing of the cause on bill and answer, such documents may be proved at the hearing, either *vivâ voce* or by affidavit : (see Hallilay's Ch. Suit, 48 ; Ayck. New Ch. Pr. 123, 124.) As before stated, an order of course is first obtained ; (Smith's Ch. Pr. *ubi sup.*)

**Q.**—Where by the answer of a defendant the validity of a deed relied on by the plaintiff is impeached on the ground of fraud, does, or does not, this circumstance form any, and if so, what, exception to the general rule referred to in the last question ? If so, how must such a deed be proved by the plaintiff ? And give the reason why.

**A.**—Although, according to the ordinary rule of the court, the execution of deeds, or the handwriting of letters and other documents, is allowed to be proved *vivâ voce* ; yet when, by the defendant's answer, the validity of a deed is impeached upon an alleged fraud, in this case the plaintiff must prove his deed before an examiner, in order that the defendant may have an opportunity of cross-examining the witness touching the fraud in question : (see Goldsmith's Eq. Pr. 348, 4th edit. ; Hallilay's Ch. Suit, 49 ; Drew. Ch. Pr. 139 ; Smith's Ch. Pr. 256, 5th edit.)

**Q.**—Are there, or are there not, any and what circumstances appearing on a defendant's answer which will prevent a plaintiff from proving a deed *vivâ voce* at the hearing of a cause ?

**A.**—No deed can be proved *vivâ voce* that requires more than proof of the execution, nor where such examination would admit of cross-examination : (Ayck. New Ch. Pr. 125 ; Hallilay's Ch. Suit, 49 ; Smith's Ch. Pr. 255, 5th edit.) ; as shown in the preceding answer.

**Q.**—In a suit in equity by an incumbrancer against a purchaser for valuable consideration, in which such purchaser is sought to be affected with notice of the incumbrance, and in which such notice is proved by one witness only, but is positively and expressly denied by the answer, in whose favour will the court decide ?

**A.**—The court will decide in favour of the purchaser, unless the testimony of the witness is supported by corroborative circumstances of sufficient weight ; because the denial of the facts by the answer on oath is equally strong with the affirmation of them by one witness unsupported by corroborative circumstances. But it would be otherwise if so sup-

ported, or if there were two witnesses : (see 2 Dan. Ch. Pr. 405, 406 ; Goldsmith's Eq. Pr. 312, 4th edit.)

Q.—At what distance of time do deeds, bonds, and other writings prove themselves, and thereby render their proof unnecessary ?

A.—When they are thirty years old and upwards : (Ayck. Ch. Pr. 123, 4th edit. ; Hallilay's Ch. Suit, 48 ; Powell on Ev. 307.)

Q.—When, and in whose behalf, is parol evidence admissible to explain or vary a written contract ?

A.—As before seen (*ante*, pp. 63, 64), parol evidence may in all cases of doubt be received to *explain* a written contract. In further explanation of this rule, it may be stated that the law recognises, according to the authority of Lord Bacon, two kinds of ambiguities, viz., *patent* and *latent*. A *patent* ambiguity is said to exist where the instrument on its face is unintelligible, as where a blank appears in the place of the name of a party to an instrument. In such a case, extrinsic evidence is wholly inadmissible to show who was intended to be mentioned : (see Powell on Ev. 345 ; Sug. V. & P. Conc. View, 113, 115.) A *latent* ambiguity is where a written instrument is intelligible on its face, but a difficulty arises from extrinsic circumstances in understanding and carrying out its terms (*ib.*) ; as where an estate is conveyed by the designation of Blackacre, parol evidence may be received to show what property is known by that name : (see *ante*, p. 37 ; Sug. V. & P. Conc. View, 115, 116 ; Powell on Ev. 346, *et seq.*) A parol variation of a written agreement will only be received in equity on behalf of a defendant resisting a specific performance, and not by a plaintiff seeking such performance ; except where there has been a part performance of the parol portion, or where an omission has occurred by fraud, or where the parol variation set up by the plaintiff is not objected to by the defendant ; (see Story's Eq. Jur. § 170, and note ; Sug. V. & P. Conc. View, 103, *et seq.*)

Q.—What is the practice with regard to the production of books, accounts and documents, the possession of which is admitted by the defendant ; and if they relate to other matters besides those which are the subject of the suit, how is the defendant protected from such other matters being disclosed to the plaintiff ?

A.—If books and documents have been admitted to be in the possession of the defendant, and described by the defendant's answer, and relate to the matters in question in the suit, and are not privileged (see *infra*), the court will order their production. If books, &c. relate to other matters beside those which are the subject of the suit, such parts will be directed to be sealed up ; but an affidavit must be made of the facts : (see Ayck. Ch. Pr. 267, 268, 4th edit. ; Hallilay's Ch. Suit, 51.) As will be seen by the above, on an application for the defendant to produce documents, the court rested entirely upon the admissions in the defendant's answer. But now, by the 15 & 16 Vict. c. 86, s. 18, the court has power to order the production by any defendant, upon oath, of documents in his power or possession relating to the suit, whether he has been required to answer or not : (Ayck. New Ch. Pr. 267 ; Hallilay's Ch. Suit, 49 ; Smith's Ch. Pr. 336, 337, 5th edit.)

Q.—Are there any, and what, documents stated in an answer, which are privileged from production ?

A.—If it clearly appears that the documents do not relate to the

plaintiff's title, the court will not order their production; and, by the 15 & 16 Vict. c. 86, s. 18, the documents must relate to the matters in question in the suit. So confidential communications made between solicitor and client, acting merely in the relation of solicitor and client, and which took place either in the progress of the suit or with reference to the suit previous to its commencement, are privileged: (see Ayck. New Ch. Pr. 267; Hallilay's Ch. Suit, 50.) So if the documents are in the hands of the defendant's solicitors, as solicitors for him and other persons not parties to the suit, production will not be ordered: (Hallilay, *ubi sup.*; Drew. Ch. Pr. 86, 87; 13 Jur. 442.)

Q.—Can a defendant to a bill who is required to answer, enforce production of documents in the plaintiff's possession? If so, how, and at what period of the suit?

A.—By the 20th section of the 15 & 16 Vict. c. 86, it is enacted, that it shall be lawful for the court, upon the application of any defendant in any suit, whether commenced by bill or by claim, but as to suits commenced by bill, where the defendant is required to answer, not until he has put in a sufficient answer to the bill, unless the court otherwise orders, to make an order for the production by the plaintiff in such suit, on oath, of such of the documents in his possession or power relating to the matters in question in the suit, as the court shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just: (sect. 20; Hallilay's Ch. Suit, 50.) The application for the order is made at chambers by summons. The defendant may, it seems, make this application immediately on filing his answer; but the court will give the plaintiff time according to circumstances to consider whether the answer is sufficient, in accordance with the words of the act: (*Walker v. Kennedy*, 29 L. T. Rep. 37; see generally Hallilay's Ch. Suit, 51.)

Q.—State the course of proceeding for compelling the production (for the purpose of inspection) of documents in the defendant's possession, which are considered material to the plaintiff's case, and the earliest time when such proceedings may be taken?

A.—Formerly, upon an application for the defendant to produce documents, the court proceeded entirely on the admission contained in the defendant's answer. By the 15 & 16 Vict. c. 86, however, it is provided that the court may, on the application of the plaintiff in any suit, ~~whether commenced by bill or by claim, and as to suits commenced by bill~~, whether the defendant may or may not have been required to answer the bill, or may or may not have been interrogated as to the possession of documents, make an order for the production by any defendant upon oath of such of the documents in his possession or power relating to the matters in question in the suit as the court shall think right: (sect. 18.) The order is obtained at chambers, a summons being taken out for the purpose: (Hallilay's Suit in Ch. 49.) It is usual to wait until the defendant has answered; or if no answer has been required, the application may be made as soon as the defendant has appeared.

Q.—What is the ordinary rule of courts of equity as to the place where, and the person with whom, documents will be ordered to be lodged for the inspection of the plaintiff; and is this rule ever relaxed?

A.—By the 57th Order, 16th Oct. 1852, it is ordered, that where any deeds or other documents are ordered to be left or deposited, the same are to be left or deposited in the record and writ office, and are to

be subject to such directions as may be given for the production thereof. When books are used constantly by the defendant in his business, the court will order them to be inspected at the office of the defendant, or of his solicitor; but the party must make an affidavit of the fact. So when the suit is amicable, it is not unusual for the plaintiff to allow the documents to remain in the defendant's possession, and to take the inspection at his solicitor's office, instead of their being deposited with the clerk of records and writs, which is a considerable saving of expense: (Ayck. New Ch. Pr. 270, 271; Hallilay's Ch. Suit, 52.)

Q.—How is the attendance of a witness to be enforced for the purpose of examining him before the examiners?

A.—By serving him with a *subpœna ad testificandum*. At the time of serving the *subpœna*, a notice to attend before the examiner should be served upon the witness: (Ayck. New Ch. Pr. 142, 143; Hallilay's Ch. Suit, 59; Smith's Ch. Suit, 236, 5th edit.)

Q.—Must a *subpœna ad testificandum* be served personally on the witness, or will the mere leaving it at his house be sufficient service?

A.—A copy of the *subpœna* must be personally served upon the witness, and the original, at the same time, shown to him; leaving it at his house is not sufficient. His necessary expenses should also be tendered him: (Ayck. New Ch. Pr. *ubi sup.*; Hallilay, *ubi sup.*; Smith, *ubi sup.*)

Q.—For what period of time, after notice of a witness being under examination before an examiner, must the party examining such witness keep him in town for the purpose of his being cross-examined?

A.—The party examining such witness must keep him in town forty-eight hours after service of the written notice upon the adverse solicitor, in order that the opposite party may cross-examine him: (Goldsmith's Eq. Pr. 342, 4th edit; Drewry's Ch. Pr. 48.)

Q.—If a party omits to avail himself of the time allowed him for cross-examination referred to in the last question, is he thereby precluded from such cross-examination altogether, or can he on any, and what, terms still procure such cross-examination?

A.—He may cross-examine the witness, but at his own expense: (Goldsmith, *sup.*; Drewry, *sup.*)

Q.—What is the meaning of examining witnesses *de bene esse*; and when is it advisable to do so?

A.—Examining witnesses *de bene esse* means examining them conditionally. When a witness is seventy years old or upwards, or is in a dangerous state of health, or is about to go abroad, whereby his evidence is liable to be lost, an order may be obtained to examine him *de bene esse*. So where a matter of great importance is in the knowledge of one witness only, though not old or infirm, the order will be granted. The order is generally obtained upon motion or petition, as of course. The application must, in any case, be supported by an affidavit of the facts, such as the age of the witness, &c. If the witness be alive and able to attend the trial, the depositions are never published: (see Ayck. Ch. Pr. 140, 141; Story's Eq. Jur. §§ 1512, *et seq.* and notes; Hallilay's Ch. Suit, 58.) As to perpetuating testimony, see *ante*, p. 287.)

Q.—To whom must a party apply for an order to enlarge publication? (a)



A.—To a judge (*i. e.*, his chief clerk) at chambers; for which purpose a summons must be taken out, served and attended in the usual way: (Ayck. New Ch. Pr. 147; Hallilay's Ch. Suit, 60; Smith's Ch. Pr. 218, 5th edit.)

Q.—What is the effect of passing publication; and when is it passed?

A.—After publication is passed, or more correctly when the time for taking evidence is closed, no further evidence, whether oral or by affidavit, can be received, without special leave of the court previously obtained for that purpose; but any witness who has made an affidavit intended to be used by any party to a cause at the hearing thereof, shall be subject to cross-examination within one month after the expiration of eight weeks after issue joined in the cause. The time for closing evidence on both sides (including cross-examination and re-examination) is eight weeks after issue joined, except as to any party who has made an affidavit as above stated: (15 & 16 Vict. c. 86, s. 38, 5th Order Jan. 1855; Hallilay's Ch. Suit, 56, 60; Smith's Ch. Pr. 218, 5th edit.)

Q.—Can, or cannot, witnesses be examined or re-examined after publication has passed? Give your reason if they cannot, and if they can, state instances in which it is done?

A.—A witness cannot be examined or cross-examined after the time for taking evidence is closed without the special leave of the court is obtained for that purpose; but any witness who has made an affidavit intended to be used by any party to a cause at the hearing thereof, shall be subject to cross-examination within one month after the expiration of eight weeks after issue joined therein: (see 15 & 16 Vict. c. 86, s. 38, 5th Order, Jan. 1855; Hallilay's Ch. Suit, 56, 60.) Any party desiring to cross-examine a witness who has made such an affidavit, is to give forty-eight hours' notice to the party on whose behalf such affidavit was filed, or to the party intending to use the same, of the time and place of such intended cross-examination, in order that such party may, if he shall think fit, attend the cross-examination: (34th Order, 7th Aug. 1852.) So notice of the cross-examination must be given to the witness, and his expenses tendered him: (15 & 16 Vict. c. 86, s. 38; Hallilay's Ch. Suit, 57.)

Q.—What is the present form in which all affidavits should be made; and what is the consequence if such form be not observed?

A.—All affidavits are to be taken and expressed in the first person of the deponent: (126th Order, May 1845); and are to be divided into paragraphs, and every paragraph must be numbered consecutively, and, as nearly as may be, confined to a distinct portion of the subject: (15 & 16 Vict. c. 86, s. 37.) And by an order of Jan. 1855, affidavits, whether used at the hearing of a cause or on any other proceeding before the court, are to state distinctly what facts or circumstances deposed to are within the deponent's own knowledge, and his means of knowledge, and what parts deposed to are known by reason of information derived from other sources than his own knowledge, and what such sources are: (8th Order, Jan. 1855.) No costs are to be allowed the party preparing and filing such affidavit, if he substantially departs from the above mode: (see 128th Order, May 1845, and 9th Order, Jan. 1855; Hallilay's Ch. Suit, 55.)

Q.—What is a commission to examine witnesses, or to take pleas, answers, or disclaimers; and in what cases is it necessary?

*A.*—A commission is an authority delegated to certain persons to do certain acts therein specified. Commissions to examine witnesses within the jurisdiction are, by the 15 & 16 Vict. c. 86, s. 28, abolished, and witnesses are now examined by examiners, who have the same power of administering oaths as commissioners have under commissions issued by the court for the examination of witnesses: (sect. 35.) And it has been held, that a commission for the examination of witnesses *out* of the jurisdiction is not necessary: (*Crofts v. Middleton*, 9 Hare, App. 18; Week. Rep. 74); but that examiners should be appointed: (*id.*, and see Hallilay's Ch. Suit, 57, 58; Ayck. New Ch. Pr. 130, 138.) Commissions to take pleas, answers and disclaimers, within the jurisdiction of the court, are also, by the 15 & 16 Vict. c. 86, s. 21, abolished; and pleas, answers and disclaimers are taken at the record and writ clerk's office, or before a solicitor, being a commissioner to administer oaths in Chancery in England. So pleas, answers and disclaimers may be taken by practising solicitors in the Channel Islands and Isle of Man, being commissioners to administer oaths, &c. So consuls and vice-consuls are authorised to take pleas, answers and disclaimers, out of the jurisdiction. It will, therefore, be seldom necessary to issue a commission to take pleas, &c., but where the defendant is residing out of the jurisdiction, at a place at which there is no person authorised to administer oaths, or at which there is no consul or vice-consul, a commission may still be necessary: (Ayck. New Ch. Pr. 84; Hallilay's Ch. Suit, 23, 24.)

*Q.*—According to the practice of the Court of Chancery, can a commission to examine witnesses abroad be obtained before the time for answering has expired?

*A.*—As a general rule, a commission to examine witnesses abroad cannot be obtained until after the defendant's time for pleading has expired: (19 Ves. 379.)

*Q.*—Explain the mode of preparing the brief for counsel on the hearing.

*A.*—The brief for the plaintiff, when the cause is to be heard on evidence, consists of a copy of the bill, of all the answers and all the evidence on both sides. These (with the exception of the printed bill), and any instructions and observations that may be thought necessary, are copied on brief paper, and delivered to counsel, and a consultation appointed and attended: (see Hallilay's Ch. Suit, 62; Drew. Ch. Pr. 135; Ayck. New Ch. Pr. 153.)

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### SETTING DOWN CAUSES.

*Question.*—Where a cause is at issue in Chancery, before whom must it be set down for hearing?

*Answer.*—By orders of May 1837, and 29th Oct. 1851, all causes are to be set down for hearing before the judge to whose court the same have

been attached, unless removed by special order of the Lord Chancellor : (Ayck. New Ch. Pr. 148; Hallilay's Ch. Suit, 61.)

*Q.*—Within what time after sufficient answer must the plaintiff set down his cause for hearing ?

*A.*—The plaintiff (not obtaining an order for leave to amend his bill) must either file his replication, or set down the cause to be heard on bill and answer, within four weeks after the last answer is deemed or found to be sufficient; otherwise any defendant may move to dismiss the suit for want of prosecution : (116th Order, May 1845, art. 37; 114 *ib.* art. 1; Ayck. New Ch. Pr. 117, 148; Hallilay's Ch. Suit, 46; Smith's Ch. Pr. 250, 5th edit.)

*Q.*—Within what time after publication is the cause to be set down for hearing ?

*A.*—Within four weeks after publication has passed, that is, after the evidence is closed, the plaintiff is to set down his cause, and obtain and serve a subpoena to hear judgment, otherwise any defendant may move to dismiss the bill for want of prosecution : (16th Order, May 1845, art. 45; 114 *ib.* art. 4; Ayck. *ubi sup.*; Hallilay's Ch. Suit, 61; Smith's Ch. Pr. 250, 5th edit.; see also 29th Order, Aug. 1852.)

*Q.*—Are there any cases in which it is proper for the plaintiff, without replying to the answer, to set down a cause upon the bill and answer ? If so, state under what circumstances this is to be done.

*A.*—If the defendant's answer admits the allegations made by the plaintiff in his bill, then there is no necessity for a reply, for the parties, being in a condition to proceed at once to a hearing, the plaintiff may set down the cause to be heard on bill and answer. As a general rule, if the cause be set down on bill and answer, it is an undertaking to hear it on the allegations therein contained, and no other evidence can be gone into. If the plaintiff intends to go into evidence, he must file a replication : (Ayck. New Ch. Pr. 116, 121, 148; Hallilay's Ch. Suit, 45, 47.)

*Q.*—Can a plaintiff set down his cause for hearing on bill and answer without examining witnesses ; and, if so, can he at the hearing rely upon any facts not admitted by the answer, or deny any facts that are asserted therein ?

*A.*—As already seen, the plaintiff may set down the cause on bill and answer ; and, as a general rule, if the bill be so set down for hearing, it is an undertaking to hear it on the allegations therein contained, and no other evidence can be gone into. If the plaintiff wish, at the hearing, to rely upon facts not admitted by the answer, or deny facts asserted in it, he must file a replication before he can do so : (Ayck. New Ch. Pr. 116, 121 ; Hallilay's Ch. Suit, 47.)

*Q.*—Can a defendant set down a cause for hearing ?

*A.*—Yes ; by 116th Order, May 1845, if, after the evidence is closed, the plaintiff neglects to set down the cause to be heard, any defendant, after the expiration of four weeks, may set the same down at his own request instead of proceeding to dismiss the bill for want of prosecution, and may obtain a subpoena to hear judgment, and serve the same on the plaintiff : (Ayck. New Ch. Pr. 150 ; Hallilay's New Ch. Suit, 61 ; Smith's Ch. Pr. 251, 5th edit.)

*Q.*—On whom should the subpoena to hear judgment be served ?

*A.*—Where the cause has been set down and the registrar's note thereof obtained, the plaintiff should issue a subpoena to hear judgment.

Service thereof upon a defendant's solicitor, is to be deemed good service upon the party : (26th Order, May 1845.) A copy of the subpœna must be served upon the solicitor for each defendant for whom he appears, and the original shown at the time : (see Ayck. New Ch. Pr. 151 to 153; Hallilay's Ch. Suit, 61.) If the cause be set down at the defendant's request, he may obtain a subpœna to hear judgment, and serve the plaintiff : (116th Order, May 1845.) But the plaintiff must serve the other defendants : (Ayck. New Ch. Pr. 151 ; Hallilay's Ch. Suit, 61.)

## THE HEARING.

*Question.*—When a cause has proceeded to a hearing, and is then ascertained to be defective for want of parties, does, or does not, that form a ground for dismissal of the bill, or will the court adopt any other, and, if so, what, course in consequence of such defect ?

*Answer.*—If at the hearing the suit is defective for want of parties, the defendant cannot move to dismiss the bill absolutely, but the court may make such order as may be just, which is to order the plaintiff, within a certain time, to make good the defect, or in default to dismiss the bill with costs : (see Ayck. Ch. Pr. 255, 4th edit.) But no case is now to be set down for argument merely on an objection for want of parties : (15 & 16 Vict. c. 86, s. 43.) And where there is a misjoinder of plaintiffs, and the plaintiff having an interest has died, leaving a plaintiff on the record without an interest, the court may, at the hearing of the cause, order the cause to stand revived, as may appear just, and proceed to a decision of the cause, if it shall see fit, and give directions as to costs : (sect. 49 ; see also sect. 42, and rules thereon, and *ante*, pp. 290, 291 ; Hallilay's Ch. Suit, 81.)

*Q.*—If a cause has been heard, and a decree made, before whom must the cause be heard on further directions ? (*a*)

*A.*—Every cause requiring to be heard on further directions, or on the equity reserved, is to be set down to be heard before the judge to whose court the cause has been attached, pursuant to Orders of May, 1837, and 29th Oct. 1851, unless removed by special order of the Lord Chancellor : (Ayck. New Ch. Pr. 307 ; and see Hallilay's Ch. Suit, 77.)

*Q.*—What are the inquiries usually inserted in a decree made on the hearing of an ordinary administration suit ?

*A.*—1. An account of the personal estate not specifically bequeathed. 2. As to debts and funeral expenses. 3. If the estate is devised by will, inquiries for legatees and annuitants, or, if it is an intestacy, for the next-of-kin of the deceased. If real estate is to be administered, inquiries for

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(*a*) As to suits since 1852, it is termed, setting the cause down on further *considerations*, instead of further *directions*. Digitized by Microsoft®

heirs-at-law have to be made. The inquiries are worked out in chambers: (see *Ayck. Ch. Pr.* 382, 421, 4th edit.)

*Q.*—If the plaintiff does not require an answer, what steps must he take to bring his cause to a hearing?

*A.*—The plaintiff may, if he does not require an answer, instead of bringing the cause to a hearing in the ordinary way, proceed by moving for a decree. The mode of obtaining such decree is pointed out by the statute 15 & 16 Vict. c. 86, and Orders of 7th Aug. 1852. Sect. 15 of the act provides, that the plaintiff in any suit commenced by bill may, at any time after the time for answering has expired, but before replication, move the court, one month's notice being previously given (see Order 22, Aug. 7, 1852), for such decree or decretal order as he may think himself entitled to. The plaintiff and defendant respectively may file affidavits in support of, and in opposition to, the motion, and use them on the hearing. At the time the plaintiff gives the notice of motion he sets the cause down with the registrar, and it will be heard in due course: (*Hallilay's Ch. Suit*, 43, 44.) This notice is equivalent to the hearing of a cause, and the court may grant such relief as may be incidental to the prayer of the bill: (see *Norton v. Steinkopf*, 1 Kay, 50; 2 W. R. 34; *Hallilay's Ch. Suit*, 45; *Smith's Ch. Pr.* 209, 210, 5th edit; see also hereon *Pellatt v. Nicholls*, 29 L. T. Rep. 289; *Boyd v. Jagger*, 17 Jur. 655; *Williams v. Williams*, 17 Jur. 434; 22 L. J. 639.)

## DECREES AND THEIR ENFORCEMENT.

*Question.*—Can persons, not parties to a suit, enforce obedience to an order; and can such obedience be enforced against them?

*Answer.*—By the 15th Order, Aug. 1841, it is ordered, that every person not being a party in a cause, who has obtained an order, or in whose favour an order shall have been made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the cause; and every person not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party to the cause. This order merely extends to such orders as are made in a cause, and not to those obtained in a matter: (*Re Blake*, 9 Beav. 210; *Re Lovell*, *ib.* 332; *Hallilay's Ch. Suit*, 69, 70; *Ayck. New Ch. Pr.* 180.) But, by an order of July 1857, the word "person" is introduced after the word "party;" and also the words "made in any suit or matter" after the word "decree" into the 11th and 12th Orders of April 1842; and thus the effect of the foregoing order, and the decisions thereon, are superseded: (*Hallilay's Ch. Suit*, 70.)

*Q.*—Does an order generally take effect from the time when it is pronounced, or from the time when the same is served?

*A.*—Before any proceedings can be taken to enforce a decree or order, the same must be served on the party against whom the same has been

obtained, pursuant to 10th Order, April 1842. And by the 12th *id.* and Order of July, 1857, it is also ordered, that every order or decree, requiring any party to do any act thereby ordered, shall state the time, or the time after service of the order or decree, within which the act is to be done : (Ayck. New Ch. Pr. 180; Hallilay's Ch. Suit, 69; Smith's Ch. Pr. 299, 5th edit.) By the 1st Order of Aug. 1852, however, an appeal from any decree, order, or dismissal must be made within five years from the date of the decree, order, or dismissal respectively. So by the 5th *id.* a decree or order must be enrolled within five years from its date : (see Ayck. New Ch. Pr. 176, 282 ; Hallilay's Ch. Suit, 68.)

Q.—If a plaintiff's solicitor, having the carriage of a decree, delay the prosecution of it, has the defendant any, and what, remedy ?

A.—In such a case, the defendant has a remedy by motion to the court. The motion may be "that the plaintiff's solicitor may forthwith return to A. B., the registrar, the decree made on the hearing of the cause, on such a day, which was by him drawn up, in order that the party applying may have a copy thereof, and that the same may be passed and entered," or according to circumstances : (see 4 Beav. 386 ; 2 Dan. 997.)

Q.—How are decrees and orders of the court enforced ?

A.—The only process now adopted for the purpose of enforcing decrees and orders (not being for payment of a sum of money or costs) is writ of attachment, serjeant-at-arms, or sequestration, or writ of assistance. Before proceeding to enforce a decree or order, however, it must be served : (10th Order, April 1842 ; and see Ayck. New Ch. Pr. 180 ; Hallilay's Ch. Suit, 70, *et seq.* ; Smith's Ch. Pr. 298, 299, 5th edit.)

Q.—What is the mode of enforcing a decree where money or costs are ordered generally to be paid to a person ?

A.—By the 1 & 2 Vict. c. 110, and the Orders, 10th May 1839, issued in pursuance thereof, it is provided, that any person in any cause or matter pending in the Court of Chancery, to whom any sum of money or any costs have been ordered to be paid, shall, after the lapse of one lunar month from the passing and entering of the order, be entitled to a writ of *fiery facias* or *elegit* : (Ayck. New Ch. Pr. 180; Hallilay's Ch. Suit, 71 ; Smith's Ch. Pr. 298, 5th edit.) A writ of attachment may, however, be issued, if thought preferable : (11th Order, April 1842; and references *supra.*)

Q.—If a party to a suit, who is ordered by the court to execute a deed, obstinately refuses to do so, is there any, and, if any, what, mode of giving effect to the order without obtaining the signature of the party ?

A.—By the 1 Will. 4, c. 36, s. 15, and rule 15, it is provided, that when any person shall be directed by any decree or order to execute a deed or other instrument, and shall have refused or neglected to execute the same, and shall have been committed to prison under process for such contempt, or being confined in prison for any other cause, shall have been charged with or detained under process for such contempt, and shall remain in prison, the court may, upon motion or petition, and upon affidavit that such person has, after the expiration of two calendar months from the time of his being committed under, or charged with, or detained under, such process, again refused to execute such deed or instrument, order or appoint one of the judge's chief clerks (15 & 16 Vict. c. 80), or if the deed is to be executed out of London, then a commis-

sioner to administer oaths in Chancery (15 & 16 Vict. c. 78), to execute such deed or other instrument for and in the name of such person; and the execution of the said deed or other instrument, as aforesaid, is to have the same force and validity as if it had been executed by the party himself; and, within ten days after the execution, notice thereof must be given by the adverse solicitor to the party in whose name the deed or other instrument was executed; and such party is then to be deemed to have cleared his contempt, except as regards the payment of costs of the contempt; and is entitled to his discharge: (Ayck. New Ch. Pr. 186, 187; Hallilay's Ch. Suit, 72.)

Q.—What is the nature of a writ of assistance, and when is it issued?

A.—A writ of assistance, issued out of Chancery, is for the purpose of enforcing delivery of possession. Upon due service of a decree or order for delivery of possession (of lands or tenements, &c.), and refusal to obey such order, the party prosecuting the same is entitled to an order for a writ of assistance: (Ayck. New Ch. Pr. 182, 4th edit; Hallilay's Ch. Suit, 71; Smith's Ch. Pr. 302, 5th edit.) It is not now necessary to make a demand of the delivery-up of the property, as was formerly necessary: (Order, 15th April 1859.)

Q.—When is the proper time in a suit commenced by bill for a motion for a decree; what notice of it must be given; to whom is it to be given; and what parties does it bind?

A.—The plaintiff in any suit commenced by bill may, at any time after the time allowed to the defendant for answering has expired (but before replication), move the court for a decree: (15 & 16 Vict. c. 86, s. 15.) One month's notice of such motion, however, is to be given by the plaintiff to the defendant or defendants (22nd Order, 7th Aug. 1852); and the decree will bind the parties against whom the motion is made in the same way as a decree on the hearing: (see *Norton v. Steinkopf*, 1 Kay. 45; 2 Week. Rep. 34; Hallilay's Ch. Suit, 43, 145; Smith's Ch. Pr. 209, 5th edit; Ayck. New Ch. Pr. 113, *et infra*.)

Q.—Can replication be dispensed with when an adverse decree is sought by evidence to contradict the defence? And, if so, what is the plaintiff's course to obtain a decree?

A.—It is not necessary to file replication when the plaintiff proceeds by motion for decree. The plaintiff's course to obtain such decree is this—in any suit commenced by bill such plaintiff may, at any time after the time for answering has expired (but before replication), move the court for a decree; one month's notice thereof must, however, be given by the plaintiff to the defendant. The motion for decree must be set down in the cause list, and it is argued on affidavits, and is in effect the same as the hearing of a cause, and the court may grant such relief as may be incidental to the prayer of the bill: (see *Norton v. Steinkopf*, 1 Kay, 45; 2 W. R. 34; references to preceding answer; *et ante*, p. 325.)

Q.—How far is a decree made on the hearing of a cause binding, or how can it be made binding, against a defendant who is abroad and does not appear?

A.—A defendant may be served with proceedings out of the jurisdiction; and if the defendant neglects to appear upon the hearing of the cause, having been duly served with a subpoena to hear judgment, the plaintiff, upon production of an affidavit to that effect, is entitled to a

decree by default, which decree is absolute in the first instance, without giving the defendant a day to show cause, as was done formerly : (44th Order, Aug. 1841 ; Ayck. New Ch. Pr. 160, 164.)

## DISMISSING SUITS.

*Question.*—What course must be adopted by a defendant in the event of the plaintiff not proceeding with due diligence ; and how does the practice vary at different stages ?

*Answer.*—If a plaintiff does not prosecute the suit with due diligence, the defendant should move to have it dismissed. By the 114th Order, May, 1845, it is ordered, that any defendant may, upon notice, move the court that the bill may be dismissed, with costs, for want of prosecution, and the court may order accordingly :—

1. If the plaintiff, having obtained no order to enlarge the time, does not obtain and serve an order for leave to amend the bill, or does not file the replication, or set down the cause on bill and answer, within four weeks after the answer, or last of answers, is found or deemed to be sufficient, or after the filing of a traversing note ; or,

2. If the plaintiff, having undertaken to reply to a plea to the whole bill, does not file his replication within four weeks after the date of his undertaking ; or,

3. If the plaintiff, having obtained no order to enlarge the time, does not amend the bill within fourteen days after the date of the order for leave to amend ; or,

4. If the plaintiff, having obtained no order to enlarge the time, does not set down the cause to be heard, and obtain and serve a subpoena to hear judgment, within four weeks after publication has passed : (Ayck. New Ch. Pr. 250 ; and Smith's Ch. Pr. 201, *et seq.* 5th edit.) As to when a defendant may, when the plaintiff has, after answer, amended his bill without requiring an answer to the amendments, move to dismiss for want of prosecution, see 115th Order, May 1845.

The 114th and 115th Orders, *supra*, merely apply to those cases in which a defendant has answered, or been required to answer, the bill. But by the 15 & 16 Vict. c. 86, s. 27, and 29th Order, 7th Aug. 1852, it is provided, that where a defendant to a suit commenced by bill shall not have been required to answer, and has not answered, the same, such defendant may move to dismiss the bill for want of prosecution at any time after the expiration of three months from the time of his appearance, unless a motion for a decree or decretal order shall have been set down in the mean time, or the cause shall have been set down to be heard : (Ayck. New Ch. Pr. 250, 251.)

*Q.*—Under what circumstances, and upon what terms, may a plaintiff and defendant respectively dismiss a bill before a decree ?

*A.*—If a plaintiff conceives that he shall not be able to prosecute his suit effectually, he is at liberty to dismiss his bill, either as against all the defendants, or as against such of them as he thinks he can dispense



with. As a general rule, this may be done at any time previously to the decree; but after a general demurrer has been overruled on argument, the plaintiff, it would appear, is not entitled, as of course, to an order to dismiss. If the bill be dismissed before the defendant has appeared, it is without costs; after appearance, however, the bill cannot be dismissed without costs, unless upon the defendant's consent given in court. By the 117th Order, May 1845, if the plaintiff, on his own application, causes the bill to be dismissed after the cause is set down to be heard, it is to be deemed equivalent to a dismissal on the merits, unless the court otherwise orders, and may be pleaded in bar to another suit for the same matter. A bill may be dismissed by the defendant, either upon the abatement of the suit by the death of the plaintiff, or otherwise, or for want of prosecution. The defendant, however, must give notice of his intended motion to dismiss. If the bill be dismissed, the plaintiff will have to pay costs: (see Ayck. New Ch. Pr. 248, *et seq.*; Hallilay's Ch. Suit, 79, 81; also Smith's Ch. Pr. 199, *et seq.* 5th edit., *et supra.*)

Q.—How may a bill be dismissed after a decree?

A.—After a decree, the bill can only be dismissed upon re-hearing or appeal: (Ayck. New Ch. Pr. 248; Hallilay's Ch. Suit, 80; Smith's Ch. Pr. 199, 5th edit.; 11 Ves. 602.)

Q.—When a plaintiff is served with a notice of motion to dismiss his bill for want of prosecution, what step must be taken by him to prevent such dismissal?

A.—The plaintiff, on being served with a notice of motion, must be prepared to meet the application in one of the three following modes, namely: either, 1st, obtain an order for leave to amend his bill; or, 2ndly, file a replication in the cause; or, 3rdly, appear on the hearing of the motion, and ask for such terms as the state of the proceedings may justify: (Ayck. New Ch. Pr. 252; Hallilay's Ch. Suit, 80, 81; Smith's Ch. Pr. 203, 5th edit.)

Q.—How soon, after filing his answer, is a defendant at liberty to move that the plaintiff's bill be dismissed for want of prosecution?

A.—If the plaintiff, having obtained no order to enlarge the time, does not obtain and serve an order for leave to amend the bill, or does not file the replication, or set down the cause to be heard on bill and answer, within four weeks after the answer, or last of answers, is found or deemed to be sufficient, the plaintiff may move to dismiss the bill for want of prosecution: (114th Order, May 1845; Ayck. Ch. Pr. 117, 250; Hallilay's Ch. Suit, 46; Smith's Ch. Pr. 201, 5th edit.)

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## APPEAL.

*Question.*—To what courts or tribunals do appeals lie against the decrees of the Master of the Rolls, the Vice-Chancellors, and the Lord Chancellor, respectively?

*Answer.*—If a party is dissatisfied with a decree or order of the Master of the Rolls, or of the Vice-Chancellors, he may appeal to the Lord Chancellor, or to the court of appeal (see 14 & 15 Vict. c. 83), and

afterwards appeal from that court to the House of Lords, or he may appeal direct to the Lords; in which latter case, however, the decree requires to be, first, formally recognised by the Lord Chancellor, for which purpose it must be signed by him and then enrolled. If a party be dissatisfied with a decree or order of the Lord Chancellor, an appeal lies to the House of Lords only: (Ayck. New Ch. Pr. 279, 285, 286; Hallilay's Ch. Suit, 67, 68; Smith's Ch. Pr. 278, 291, 5th edit.)

**Q.**—Can an appeal be made directly to the House of Lords against a decree of the Master of the Rolls, or of any of the Vice-Chancellors, and thus prevent an appeal to the Lord Chancellor, or the court of appeal; if so, what proceedings are necessary to be taken?

**A.**—As before seen, an appeal lies direct against a decree of the Master of the Rolls, or any of the Vice-Chancellors, to the House of Lords, if the decree be signed and recognised by the Lord Chancellor and enrolled: (Ayck. New Ch. Pr. 286; Hallilay's Ch. Suit, 67; Smith's Ch. Pr. 291, 5th edit.)

**Q.**—Does, or does not, an appeal to a superior court necessarily stay proceedings under the decree or order appealed from?

**A.**—No; if a party appealing is desirous of staying proceedings pending the appeal, he must apply specially for an order for such purpose: (Ayck. New Ch. Pr. 257; Hallilay's Ch. Suit, 82.)

**Q.**—What is the effect of enrolling a decree; and within what time must it be enrolled?

**A.**—After enrolment the court has no jurisdiction upon re-hearing or appeal; and the decree can only be varied either by bill of review or by appeal to the House of Lords. The decree should be enrolled within six months after it is pronounced or made; otherwise special leave of the court must be obtained before this can be done: (2nd Order, Aug. 7, 1852.) And by Order 5, *ib.*, no enrolment of any decree, order, or dismissal shall be allowed after the expiration of five years from the date thereof, unless this time is enlarged by the Lord Chancellor or Lords Justices: (Order 6, *ib.*; and see generally Hallilay's Ch. Suit, 67, 68; Ayck. New Ch. Pr. 175, 282; Smith's Ch. Pr. 291, 5th edit.)

**Q.**—What step must you take to prevent an enrolment of a decree?

**A.**—In order to prevent the enrolment of a decree, a caveat against the enrolment must be entered. This caveat must be prosecuted with effect within twenty-eight days after the docket of such decree or order has been left to be signed with the proper officer, otherwise the caveat is of no force. To prosecute the caveat with effect, the party entering it must present his petition of re-hearing, and obtain, and serve and set the same down: (*Groom v. Stinton*, 2 Phil. 348; Hallilay's Ch. Suit, 68, 69.)

**Q.**—When is it proper after decree to present a petition of re-hearing; when to proceed by supplemental bill in the nature of a bill of review; and when to file a bill of review?

**A.**—If the decree has not been signed and enrolled, and is upon error apparent, the party should petition for a re-hearing; if on new facts discovered, the remedy is by supplemental bill in the nature of a bill of review. If the decree has been signed and enrolled, a bill of review should be filed: (Ayck. Ch. Pr. 205, 4th edit.)

**Q.**—State the several stages of appeal in proceedings in courts of equity from decisions of the chief clerks upwards to the House of Lords;

and whether any, and what, measures may be taken to lessen the number of those stages.

*A.*—If any one is dissatisfied with the chief clerk's certificate, he may take the opinion of the judge upon it within four clear days after such certificate is signed by the chief clerk (47th Order, Oct. 16, 1852); for which purpose a summons must be taken out: (48th *ib.*) If this be not done within such four days the certificate is then to be signed and adopted by the judge: (49th *ib.*), and filed: (50th *ib.*) But it may nevertheless be varied or discharged by application to the judge within eight clear days after it is filed: (51st *ib.*) After the eight days have elapsed, and no application to vary the certificate has been made, the cause then comes on for further consideration, and a decree may be made, which decree may be appealed from to the Lords Justices; and an appeal may, if it is so wished, be had direct to the House of Lords by getting the decree of the Vice-Chancellor or Master of the Rolls signed by the Lord Chancellor and enrolled, which will prevent a re-hearing before the judge who pronounced the decree or an appeal to the Lords Justices: (see *Ayck. Ch. Pr.* 285, 4th edit.; *Drew. Ch. Pr.* 85.)

*Q.*—Set forth the various steps from the first decree of a Vice-Chancellor to the highest court of appeal in the realm.

*A.*—Before an appeal can be taken to the House of Lords, the decree of the Vice-Chancellor must be signed by the Lord Chancellor and enrolled. Notice of the petition must be given to the opposite party, of the time when such petition is to be presented; and the fact of this notice having been given must be indorsed on the back of the petition. The petition is drawn by counsel, who must certify that there is a reasonable cause of appeal; after which the petition, as well as the certificate, must be signed by two counsel, who must be either engaged in the court below or on the appeal. The petition is then engrossed on parchment in words at length, and the certificate and counsel's signatures are added. It is lodged with the clerk of appeals at the Parliament office. The petition is afterwards presented to the House by a peer, who moves that it may be read, upon which the clerk reads the prayer and the usual order is made. The appellant must, within eight days after the appeal is received, give security to the Clerk of the Parliaments, by recognisance in the penalty of 400*l.*, conditioned for the payment of the costs of the appeal. The respondent is then ordered to answer, and as soon as he does this either party may apply to have the cause appointed for hearing. The next step is for each party to prepare his case and appendix for the use of the Lords. The case contains a narrative of the proceedings in the court below; the appendix, which is prepared separately, contains a copy of the various documents referred to; these are then printed. About two or three hundred copies are printed, 100 of which are left with the clerk of appeals, and the rest are exchanged between the appellant and respondent. The appeal is then heard: (see *Ayck. New Ch. Pr.* 285, *et seq.*; *Drew. Ch. Pr.* 174, *et seq.*; *Smith's Ch. Pr.* 291, *et seq.* 5th edit.)

## COSTS.

*Question.*—If a plaintiff be resident abroad at the time of filing his bill, can a defendant obtain security for costs; if so, to what extent, and when must it be applied for?

*Answer.*—If the plaintiff be resident abroad, the defendant is entitled to an order for security for costs, and that, in the mean time, all the proceedings in the suit may be stayed. All the plaintiffs, however, when there are *several*, must be resident abroad, for if any one be within the jurisdiction the defendant is not entitled to security. Neither will security be ordered where the plaintiff is resident abroad in an official capacity, or in actual service as a British officer. The bond is to be in the penal sum of 100*l.*: (40th Order, 1828.) The defendant should apply for the security as soon as he is aware that the plaintiff is abroad, for if he takes any subsequent step in the cause he will waive his right thereto: (Ayck. New Ch. Pr. 320 to 322; Hallilay's Ch. Pr. 93; Smith's Man. 503, 506, 5th edit.)

*Q.*—If a person, not a party, takes proceedings in a cause, and he is ordered to pay to, or receive from, a party in the cause costs in respect of such proceedings, how are the costs recovered by, or from, such person?

*A.*—The costs are recovered by, or from, such person in the same manner as if he was a party in the cause, viz., 1st, under the old process of subpoena and attachment; or, 2ndly, by *feri facias* or *elegit*, under the 1 & 2 Vict. c. 110: (Ayck. New Ch. Pr. 318, 319; Smith's Ch. Pr. 94, 95, 307, 308, 5th edit.)

*Q.*—What is the present rule in force with regard to the allowance of costs between party and party?

*A.*—Where costs are to be taxed as between party and party the taxing master may allow to the party entitled to receive such costs all such just and reasonable expenses as appear to have been properly incurred in: the service and execution of writs, and the service of orders, notices, petitions and warrants; advising with counsel on the pleadings, evidence, and other proceedings in the cause; procuring counsel to settle and sign pleadings, and such petitions as appear to have been proper to be settled by counsel; procuring consultations of counsel; procuring the attendance of counsel in the master's offices upon questions relating to pleadings or title; procuring evidence by deposition or affidavit, and the attendance of witnesses; and supplying counsel with copies of, or extracts from, necessary documents. But in allowing such costs, the taxing-master is not to allow to such party any costs which do not appear to have been necessary for the attainment of justice or for defending his rights, or which appear to have been incurred through over caution, negligence, or mistake, or merely at the desire of the party: (120th Order, May 1845; Ayck. New Ch. Pr. 313; Hallilay's Ch. Suit, 92.)

*Q.*—Within what time after the delivery of a bill of costs may an order of course for taxing the same be obtained by the solicitor and client respectively?

*A.*—Upon the application of *any person chargeable* by the bill within

one calendar month after the delivery thereof, the Lord Chancellor or Master of the Rolls may refer the bill for taxation: (6 & 7 Vict. c. 78, ss. 37, 48.) The order, if applied for within the month, is an order of course, and may be obtained on petition of course, addressed to the Master of the Rolls. So, if made within twelve months, it is *ex parte*: (In *Re Gaitskell*, 14 L. J. (N.S.) 450; Ayck. New Ch. Pr. 481.) The solicitor may obtain an order of course to tax on the *expiration* of one month from the delivery of his bill, but not before: (Smith's Ch. Pr. 42, 5th edit.)

**Q.**—What parties are usually allowed to attend the taxation of costs?

**A.**—The person usually allowed to attend the taxation of costs are the solicitors of the parties in the cause: (Hallilay's Ch. Suit, 94.)

## BUSINESS BEFORE THE MASTERS AND THE JUDGES' CHIEF CLERKS.

**Question.**—In the event of the parties not proceeding with a suit, has the master any power to cause the suit to be continued, and by whom?

**Answer.**—Under the 15 & 16 Vict. c. 80, in the event of the parties in any cause, &c., or their solicitors, refusing or neglecting, within a time to be fixed by the master, to bring in the master's report or certificate before the court, the same may, by direction of the master, be brought before the court by the solicitor for the time being to the suitors' fund, and the court may order payment of the costs of the solicitor to the suitors' fund out of such of the funds in the cause, &c., or by such parties as to the court seems just: (sect. 9; see further Ayck. Ch. Pr. 354, *et seq.* 4th edit.)

**Q.**—What is the first usual proceeding in the chief clerk's chambers after the copy of the decree or order has been left, and what is done thereupon?

**A.**—Upon a copy of the decree or order, and a copy of the bill, and a note stating the name of the solicitors engaged, and for whom each acts (Order 1857), being left, a summons is to be issued to proceed with the accounts or inquiries directed; and upon the return of such summons, the chief clerk is to be satisfied by proper evidence that all necessary parties have been served with notice of the order; and thereupon directions are to be given as to the manner in which each of the accounts and inquiries is to be prosecuted, the evidence to be adduced in support thereof, the parties who are to attend on the several accounts and inquiries, and the time within which each proceeding is to be taken; further and other directions may afterwards be given: (18th Order, 16th Oct. 1852.) The summons must be prepared, issued, and served in the usual way: (see Ayck. New Ch. Pr. 368, *et seq.*; Hallilay's Ch. Suit, 73, 74.)

**Q.**—State some of the proceedings which are taken in the chief clerk's chambers on a reference in a suit for administration of assets.

**A.**—The decree generally directs an account to be taken of the testa-

tor's or intestate's personal estate, and inquiries for legatees or next-of-kin, as stated fully *ante*, p. 324. For the purpose of these proceedings, a copy of the order, &c. must be left at the judge's chambers, and a summons for directions prepared, issued and served in the usual way. The necessary advertisements for debts and claims must be issued, and the claims must be proved within the time fixed by the advertisement. The parties are to enter their claims in the summons and appointment book, and give notice thereof, and of the affidavit filed, to the solicitors in the cause, within the time fixed by the advertisement; but a claimant who has not before entered his claim may be heard on any adjournment that may be made, provided he enters his claim and files his affidavit four clear days before such adjournment, if no certificate of debts or claims has been made in the mean time: (see 15 & 16 Vict. c. 80, and Orders of 16th Oct. 1852; Ayck. Ch. Pr. 382, *et seq.* 4th edit.) So, if landed property forms partially the subject-matter of the suit, and the personal assets prove insufficient for payments of debts, legacies, &c., a sale frequently becomes necessary: (see Ayck. Ch. Pr. 385, *et seq.* 4th edit.) The chief clerk then makes his report, which must be signed and adopted by the judge and filed: (*ib.* 398 to 401, and see *infra*.)

Q.—What are the proceedings to be taken on obtaining the chief clerk's certificate?

A.—When the certificate is prepared and settled, it is to be transcribed by the solicitor prosecuting the proceedings, and is then to be signed by the chief clerk at an adjournment to be made for that purpose; except where, from the nature of the case, these proceedings can be done at chambers whilst the parties are present before the chief clerk: (46th Order, 16th Oct. 1852.) No exceptions lie to the chief clerk's certificate, but a party may take the opinion of the judge upon any matter therein, within four clear days after the certificate is signed by the chief clerk: (15 & 16 Vict. c. 80, s. 33; 47th and 48th Orders, 16th Oct. 1852.) If, at the expiration of four clear days after the certificate has been signed by the chief clerk, no party has proceeded to take the opinion of the judge thereon, the chief clerk is to get the certificate approved and signed by the judge: (15 & 16 Vict. c. 80, s. 32; 49th Order, Oct. 1852.) These orders do not apply to certificates on passing receiver's accounts: (53rd *ib.*) When the certificate is approved and signed by the judge, it is, with the accounts, if any, to be filed in the report office by the chief clerk: (15 & 16 Vict. c. 80, s. 34; 50th Order, 16th Oct. 1852; and see generally Ayck. New Ch. Pr. 398 to 401; Hallilay's Ch. Suit, 76, 77.)

Q.—A party being dissatisfied with the chief clerk's certificate in a cause in which he is interested, and desirous of taking the opinion of the court thereon, what is his course of proceeding under such circumstances?

A.—As above stated, no exceptions lie to any certificate of the chief clerk, although signed and adopted by the judge; but a party may, before the certificate is signed and adopted by the judge, take the opinion of the judge upon any particular point or matter arising in the course of the proceedings, or upon the result of the whole proceeding when brought to a conclusion. The time within which any party is to be at liberty to take the opinion of the judge, as above mentioned, is four clear days after the certificate is signed by the chief clerk. A summons must be taken out for this purpose. So, when any certificate

shall have been signed and adopted by the judge and filed, it may nevertheless be varied or discharged, either at chambers or in open court, according to the nature of the case, upon application, by summons or motion, within eight clear days after the filing of such certificate or report : (15 & 16 Vict. c. 80, s. 34 ; 51st Order, Oct. 1852.) This order does not apply to receiver's accounts : (53rd *ib.*) If no application be made to vary or discharge the certificate within the above time, it will be binding on the parties : (15 & 16 Vict. c. 80, s. 34 ; and see generally Ayck. New Ch. Pr. 399, 402 ; Hallilay's Ch. Suit, 76, 77.)

**Q.**—In what form do accounting parties bring their accounts into the chief clerk's office, and is the oath of the accounting party sufficient evidence of the payments ?

**A.**—Where the decree is in the common form, the account is simply a debtor and creditor account. The items on each side of the account are to be numbered consecutively, and the account itself must be verified by affidavit, and referred to therein as an exhibit. The oath of the accounting party is not sufficient where any payments exceed forty shillings ; but such payments must be vouched by producing the receipts properly stamped : (see 29th Order, 16th Oct. 1852 ; Hallilay's Ch. Suit, 74.) No charges or discharges, or statements of facts, are now brought in ; but when required by the chief clerk, or the judge, abstracts, extracts, &c., are to be supplied, and when directed, copies are to be handed over to the other side : (see 23rd Order, *ib.* ; Hallilay, *sup.* ; Drew. Ch. Pr. 146, &c.)

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## MISCELLANEOUS AND INCIDENTAL PROCEEDINGS.

**Question.**—State what are the principal proceedings which occur in the usual course of a Chancery suit ?

**Answer.**—They are the following : The plaintiff prepares his bill, files it, and serves the defendant with a sealed and stamped copy, properly indorsed ; the defendant then appears, and gives notice thereof to the plaintiff, upon which the plaintiff files and delivers interrogatories to the defendant. The defendant then makes his defence, which may be either by plea, answer, or demurrer, but it is generally by answer. When the answer is filed and copies obtained by the plaintiff, he may either except to the defendant's answer for insufficiency, set down the cause on bill and answer, file the replication, and go into evidence, or amend his bill. If replication be filed, as is the most usual course (even though the plaintiff has amended his bill previously), evidence is then gone into, and is closed on the expiration of eight weeks after issue joined ; when the evidence is closed, the plaintiff obtains the record and writ clerk's certificate, sets down the cause and serves the subpoena to hear judgment ; he also prepares his briefs and delivers them to counsel, attends the consultation, and must be ready in court with all necessary papers when the cause is called on ; and it will be argued by counsel, and a decree or order made, which must be passed and entered : (see further Hallilay's Articled Clerk's Handbook, tit. "Equity ;" Hallilay's Ch. Suit ; Ayck. New Ch. Pr.)

**Q.**—State the usual interlocutory proceedings in a suit.

**A.**—All proceedings which occur between the filing of the bill ~~or claim and~~ the final decree are strictly interlocutory; but what are usually termed interlocutory proceedings are the following: applications for time to plead, answer, or demur; for leave to amend ~~bills or claims~~; to enlarge the time for taking evidence; to withdraw replication; entering appearance by default; taking the bill *pro confesso*; excepting to answers; staying proceedings; dismissing suits, and the like: (see Hallilay's Ch. Suit.)

**Q.**—If a court of equity doubt the law of a case, what is now the course taken to determine it?

**A.**—A court of equity cannot, in any cause or matter, direct a case to be stated for the opinion of any court of common law, but the Court of Chancery may now determine questions of law which are necessary to be decided previously to the decision of the equitable question at issue between the parties: (15 & 16 Vict. c. 86, s. 61.) And by the 14 & 15 Vict. c. 83, s. 8, the judges in equity are enabled to obtain the assistance of the common law judges: (see Ayck. Ch. Pr. 274, 4th edit.)

**Q.**—In case the facts are doubtful upon the depositions in equity, how does the court proceed?

**A.**—In most cases of this sort, the court will allow the bill to be retained upon the file for a year; this is done to allow the parties to try the truth of such facts by an action at law: (Goldsmith's Eq. Pr. 344, 4th edit.) By the 15 & 16 Vict. c. 86, s. 62, however, in cases where formerly the court declined to grant equitable relief until the legal title or right of the party seeking relief had been established in a proceeding at law, the court may itself now determine such title or right without requiring the parties to proceed at law to establish the same. Notwithstanding the foregoing section, the court still generally directs an issue to be tried at law; and see 21 & 22 Vict. c. 27, *et ante* p. 281, and the cases there cited.

**Q.**—In case an heir-at-law disputes a will, what proceeding will the court direct to decide the question?

**A.**—Hitherto, where an heir-at-law claimed the freehold in opposition to a will, the court would not, if the heir objected, take upon itself to establish the will without previously having the opinion of a jury upon an issue *devisavit vel non*. As above seen, however, the court may itself decide such questions without requiring the parties to go into a court of law for that purpose.

**Q.**—State the alterations made by the 15 & 16 Vict. c. 86, in cases where parties seek equitable relief under a legal title or right, which has not been established at law.

**A.**—By the above act, the court may itself determine such title or right without requiring the parties to proceed at law to establish the same: (see sect. 62, and further *supra*.)

**Q.**—Has the court of equity power to award damages to the party injured? If so, when was such power conferred, and is the exercise of it limited in any way?

**A.**—By the 21 & 22 Vict. c. 27, it is provided, that in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agree-



ment, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for any such injunction or specific performance, and such damages may be assessed in such manner as the court may direct: (sect. 2.) By ss. 3, 5 and 6 damages may be assessed by a jury, or the court itself without a jury, or before a common law judge and jury at Nisi Prius or assizes, or before the sheriff of any city or county. The act came into operation on the 1st Nov. 1858, and was passed on the 28th June 1858. Notwithstanding this act and the 15 & 16 Vict. c. 86, s. 62, the court does not seem inclined to avail itself of their provisions: (see *George v. Whitmore*, 32 L. T. Rep. 290; *Griffiths v. Turner*, 33 L. T. Rep. 5.)

Q.—Where a person is entitled, in expectancy or otherwise, to a share of funds in court, and assigns his interest therein, what remedy has the assignee to protect himself against the transfer or payment out of court to the assignor of the share so assigned by him?

A.—The assignee may obtain a stop order, which will prevent the assignor from obtaining possession without notice to the assignee, or otherwise prejudicially affecting the fund: (Ayck. Ch. Pr. 349 to 351, 4th edit.)

Q.—What does the accountant-general require to authorise him to transfer stock?

A.—First, a direction for the transfer must be obtained from the registrar, which must be signed by him. This direction must then be taken, with the decree or order, to the accountant-general's office, together with a note, signed by the solicitor, containing the name, address and quality of the party to whom the transfer is to be made, and into what stock. The accountant-general will, thereupon, make the transfer: (Ayck. Ch. Pr. 341, 4th edit.)

Q.—Is there any, and what, mode, and under what authority, applied for the prevention of the transfer of stock standing in the books of the Governor and Company of the Bank of England, without resorting to a suit?

A.—Any person interested in stock standing in the books of the Governor and Company of the Bank of England may restrain the transfer of such stock by obtaining and serving a writ of *distringas*, and a notice not to permit the transfer of such stock, upon the chief accountant to the Bank. This writ is issued out of Chancery under the authority of the 5 & 6 Vict. c. 5, without a suit being first necessary. The application for the writ must be supported by affidavit. And before the chief accountant to the Bank is served, the original writ and the notice must be marked by the Bank solicitors: (see Ayck. Ch. Pr. 223, 224, 4th edit.)

Q.—By what means can the party in whose name the stock is standing, proceed to remove the restraint?

A.—If the Governor and Company of the Bank of England afterwards receive a request from the person in whose name the stock is standing, or some person on his behalf, to allow the transfer, they shall not, by force or in consequence of such *distringas*, be authorised, without the order of the Court of Chancery, to refuse to permit such transfer to be made for more than eight days after the date of such request: (4th Order, Nov. 1841.) The writ may be discharged by order of the court,

to be obtained, as of course, upon the petition of the party on whose behalf the writ was issued; and to be obtained upon the application by motion on notice, or petition duly served, of any other person claiming to be interested in the stock : (Ayck. Ch. Pr. 224, 225, 4th edit.)

Q.—What is necessary to enable parties to receive cash from the accountant-general either during the life or after the death of the party to whom or to whose representatives the order directs the money to be paid?

A.—The decree or order (directing the payment) and the report (if any), must be taken to the accountant-general in the proper division of the cause; and, upon their being left with him, if found correct, he prepares a cheque for the amount on the bank, which may generally be obtained on the second day following. For this purpose it is necessary for the solicitor to attend with the party to receive the cheque, in order to identify him. If the order be for payment to the party himself, or his personal representatives, in the event of the death of the party before payment, the accountant-general will receive the probate of the will as proof of the death, and will pay the personal representatives : (Ayck. Ch. Pr. 339, 340, 4th edit.) But no probate or letters of administration will be received if purporting to be granted six years after the date of the order directing payment : (see Order 22, Aug. 1859.)

Q.—A plaintiff proceeds both at law and in equity for the same thing; what course will the latter court adopt for the protection of the defendant, and when?

A.—Double vexation is not to be admitted; but if a party sues for the same cause at common law and in equity, he is to have a day given to make his election where he will proceed, or in default of such election to be dismissed. But the order will not be granted against a mortgagee, who is entitled to proceed both at law and in equity : (Ayck. Ch. Pr. 259, 4th edit.; 1 Ves. 431; *ante*, pp. 159, 255.) By the 7th Order, Nov. 1850, it is ordered, that a defendant, whose answer is not excepted to, or set down for hearing on former exceptions, alleging that the plaintiff is prosecuting him at law and in equity for the same matter, may, on the expiration of eight days after his answer, or further answer, is filed, obtain, as of course, on motion or petition, the usual order for the plaintiff to make his election in which court he will proceed : (Ayck. Ch. Pr. 259, 260, 4th edit.)

Q.—Name, and give a short description of, the several writs usually issued in the course of a suit.

A.—The writs now usually issued in the course of a suit are the following : *Subpœna ad testificandum*, issued where it is wished to compel the attendance of a witness to give evidence. *Subpœna duces tecum*, to compel a witness to produce any written document in his possession. The subpœna to hear judgment after the cause is set down. The subpœna and attachment to recover costs. The several writs to compel defendants to appear or answer, and to enforce the decrees or orders of the court; which are—1st, the writ of attachment, which is directed to the sheriff of the county or jurisdiction in which the defendant resides, commanding him to attach the defendant so as to have him before the court on a particular day therein mentioned, to answer his contempt. 2nd. Serjeant-at-arms, which is a prerogative process, and issues on the sheriff's return of *non est inventus* to an attachment. 3rd. Sequestration, which is also a prerogative process,

and is directed to certain commissioners therein named, empowering them to enter upon the defendant's real estates, and sequester the rents thereof, as also his goods, chattels and personal estate, and keep the same until the defendant clears his contempt. 4th. Writ of assistance, which has already been described. Besides these there are frequently issued in a suit writs of injunction, *ne exeat regno, distringas, fieri facias*, &c., all of which have been previously considered: (see Ayck. Ch. Pr. 4th edit.; Hallilay's Ch. Suit.)

**Q.**—State generally the practice in equity in presenting, serving and bringing to a hearing a petition in a cause.

**A.**—The question only refers to a special petition. Such a petition must be entitled in the cause or matter, and be addressed to the judge to whom it is to be presented. It should contain a statement of the facts upon which it is grounded, and conclude with a prayer framed according to the relief sought to be obtained. It must be left with the secretary of the judge to whom it is addressed, and the judge will thereupon appoint a day for hearing. At the same time a fair copy of the petition, on brief paper, brief ways, should be left with the secretary for the use of the judge in court. Upon the petition being answered, a copy, with the judge's appointment for hearing, must be served on all parties interested. There must, unless the court gives special leave to the contrary, be at least two clear days between the service of the petition and the day appointed for the hearing. At the time of serving the copy, the original petition, with the judge's fiat thereon, should be shown to the person served. An affidavit of service should be then made and filed, and an office copy thereof obtained, to be ready in court on the hearing. The petition will then be called on to be heard in its proper order: (Ayck. Ch. Pr. 237 to 239, 4th edit.; Hallilay's Ch. Suit, 90, 91.) The parties whom it is intended to serve must be added in a note at the foot of the petition: (Order, April, 1859.)

**Q.**—Has the Lord Chancellor power to deliver judgment in any cause after he has retired from office?

**A.**—Yes; by the 15 & 16 Vict. c. 80, it is provided, that where cases have been fully brought by the Lord Chancellor, and are standing for judgment, the Lord Chancellor may, within six weeks after he shall have delivered up the great seal, give in to the registrar of the court a written judgment therein signed by him; and a decree or order, as the case may require, shall be drawn up in pursuance of such judgment; and every such decree or order shall have the same force and effect as if the judgment in pursuance whereof it was drawn up had been given in open court the day before the Lord Chancellor shall have so delivered up the great seal: (sect. 60.)

**Q.**—What proceedings in the Court of Chancery operate as *lis pendens*, and how do you avail yourself of them?

**A.**—A suit commenced by bill or claim in the Court of Chancery is a *lis pendens*. The filing of a special case, and the entering of appearances thereto by the parties named as defendants therein, shall be taken to be a *lis pendens*: (13 & 14 Vict. c. 35, s. 17.) Also the filing of a summons at chambers *originating* proceedings in Chancery, shall have the same effect with respect to *lis pendens* as the filing of a bill or claim: (15 & 16 Vict. c. 86, s. 46.) You avail yourself of *lis pendens* by registering them, in like manner as a judgment is registered: (1 & 2 Vict. c. 110.)

**Q.**—How is an Irish judgment regarded in the administration of assets in England?

**A.**—A judgment in a foreign country is a simple contract debt here, and ranks only as such: (Matthews' Guide to Exors. 162, 2nd edit.; Will. Exors. 858, 4th edit.) And an Irish judgment forms no exception to the rule, but is treated as a simple contract debt in England: (Will. Exors. *sup.*)

**Q.**—What are the principal innovations in Chancery practice made by the act 15 & 16 Vict. c. 86?

**A.**—This act made great alterations as to parties to suits, the mode of framing bills, omitting the interrogatory part, and requiring them to be printed; abolishing the subpoena to appear, and substituting a printed copy of the bill. In the limitation of the several times to answer, &c. Abolishing the practice of excepting to answers for impertinence. Altering the mode of taking evidence. Allowing the defendant to obtain a discovery from the plaintiff by means of interrogatories without the necessity of a cross bill. Substituting an order of course to revive for a bill of revivor or supplemental bill. As to the production of documents on oath by affidavit by either plaintiff or defendant. Besides these, provisions are made for hearing a cause on motion for decree. For the court to make binding declarations of right without granting consequential relief. Assimilating the practice on the common and special injunction. Abolishing the practice of sending a *case* for the opinion of a court of law, and giving the court the power itself to decide questions of law. Substituting a summons at chambers for a suit in order to enable a creditor or legatee to obtain an order for administration; &c. &c.

## APPENDIX.

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### *Mode of proceeding, and directions to be attended to, at the Examination.*

EACH candidate will (on entering the hall) have a number given to him, and will take his seat at the *end* of the table on which such number is placed.

A paper of questions (*a*) will be delivered to him with his name and number upon it, containing the questions to be answered in writing, classed under the several heads of—

1. Preliminary.
2. Common and Statute Law, and Practice of the Courts.
3. Equity and Practice of the Courts.
4. Conveyancing.
5. Bankruptcy and Practice of the Courts.
6. Criminal Law, and Proceedings before Justices of the Peace.

Common Law and Equity are to be the subjects of the first day's examination, and Conveyancing, Bankruptcy and Criminal Law those of the second.

Each candidate is required to answer *all* the preliminary questions (No. 1), and also to answer in *three* of the other heads of inquiry, viz., *Common Law, Equity and Conveyancing*.

The answers under the above *six mentioned heads* are to be written on one side only, on *separate* papers for each head, prefixing to each answer the number of the question; and each paper should be written in a plain and legible manner, and *signed*.

The candidates are expected to finish their papers by four o'clock each day, *but no answers will be received from any candidate before one o'clock*.

After the examination is begun no candidate is to leave the hall (without permission obtained from the examiners) until he shall have delivered in his answers; and any candidate who leaves the hall without permission will not be allowed to return.

No candidate will be allowed to communicate with, or receive assistance from, or copy from the paper of, another; and in case this rule is discovered to be infringed, such person will be considered *not to have passed his examination*. (*b*)

At the top of the red ink ruled sheets for the answers is printed this

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(*a*) There are nominally fifteen questions in each branch, but they frequently contain double that number: *Vide* questions at the Trinity Term Examination 1859.

(*b*) The foregoing directions are laid down by the examiners, and a printed copy is laid before each candidate on commencing his examination.

recommendation : "You are requested to consider every question carefully before answering it, and to answer every part of it, and not to answer merely in the affirmative or negative, but to state the reason for your answer."

The examiners do not require long wordy answers, but a brief reply to each question, showing an acquaintance with the subject of the question.

A wrong answer will not be considered unfavourably if it displays an acquaintance with the subject. But this, of course, will depend upon the number of correct answers besides, for the examiners require a majority of the questions in the three indispensable heads to be answered correctly.

Notwithstanding the printed recommendation at the top of the sheets for the answers, to answer every part of the question, still, if the candidate cannot give a direct answer to every part of the question, it will be better to state what he does know on the subject than to leave it entirely unanswered.

When the candidate has finished his answers, he will call an attendant in the room, who will tie them together with the printed copy of the questions ; the candidates will then deliver them, and the ticket given on his entrance, to the secretary, at the examiner's table ; whereupon he will receive another ticket, which he is to give to the person at the door when he goes away.

The result of the examination is made known to the candidate the day succeeding the second day's examination, by circular.

The following are the questions asked at the Trinity Term Examination 1859, with their answers:—

## I. COMMON AND STATUTE LAW, AND PRACTICE OF THE COURTS.

*Question.*—Mention the different steps to be taken by the plaintiff in an ordinary action where the defendant appears and pleads.

*Answer.*—See the answer to the question, *ante*, p. 40.

*Q.*—What is the shortest time within which an execution can be issued against a defendant after the service of the writ of summons ?

*A.*—In an ordinary action the defendant has eight days after service of the writ inclusive of the day of service to appear, and in case the defendant makes default, judgment may be signed and execution issued on the expiration of eight days from the last day for appearing. If the action is brought on a bill of exchange or promissory note under the statute 18 & 19 Vict. c. 67, the defendant must obtain leave and enter an appearance to the writ within twelve days after having been served with the writ, inclusive of the day of service, and if he makes default, the plaintiff may sign judgment and issue execution on the expiration of such twelve days.

Q.—Define replevin.

A.—See the answer to this question, *ante*, p. 108.

Q.—In what case can you proceed with an action against a foreigner resident abroad?

A.—You can proceed against a foreigner resident abroad for a cause of action that arose here, or in respect of a breach of contract made in this country. Instead of a copy of the writ, the defendant is served with a notice, but the notice is to contain the same information as the writ. After service of the notice, or leave to proceed as if personal service had been effected, the plaintiff will be allowed to proceed in manner and subject to such terms and conditions as to the court or a judge seems just: (see 15 & 16 Vict. c. 76, s. 19; Smith's Action at Law, 68, 69, 5th edit.; Pat. & Mac. C. L. Pr. 106.)

Q.—Give the form of attestation of a warrant of attorney.

A.—The form of attestation to a warrant of attorney runs thus: Signed, sealed and delivered by the above named C. D., in the presence of me, the undersigned W. H. And I hereby declare myself to be attorney for the said C. D., and that I subscribe this attestation as such, his attorney: (see Pat. & Mac. C. L. Pr. 1003.)

Q.—What is the difference in the effect of the plaintiff being non-suited and having a verdict against him?

A.—See the answer *ante*, p. 71.

Q.—Under what statutory obligation is a tenant, on whom a writ in ejectment has been served, to give notice thereof to his landlord?

A.—He must forthwith give notice thereof to his landlord, or his bailiff or receiver, under penalty of forfeiting three years' improved rack-rent of the premises, holden by the tenant, to be recovered by action: (see 15 & 16 Vict. c. 76, s. 209; Chit. Arch. 966, 9th edit.)

Q.—In whose name would you sue for a chose in action?

A.—See the answer *ante*, pp. 14, 137.

Q.—In actions against two defendants, where the whole damages have been levied on one, when has the one any remedy against the other for contribution, and when not?

A.—See the answer *ante*, p. 91.

Q.—What is a lien, and when has a party a right to it?

A.—A lien is a right to retain property until a debt due to the person retaining has been satisfied. It is not incompatible with a right on the part of the person claiming it to sue for the same debt; but he may do so, retaining his lien as a collateral security. There are two kinds—general and particular. A trainer has (unless there be a usage to the contrary) a lien upon the horses trained for the expense of training them, for he has by his instruction wrought an improvement in the animal. So a solicitor has a lien upon papers in his hands for his costs due from the client: (see Smith's Merc. Law, tit. "Lien," 5th edit.; 2 Steph. Com. 132.)

Q.—What is meant by stoppage *in transitu*? Give an instance, and show how it may be defeated.

A.—Stoppage *in transitu* is the right which the law gives the vendor of goods, in certain cases, to reclaim the goods sold while on their way to the purchaser. This right arises when goods, having been sold on credit,

the vendor ascertains, before the goods have reached the purchaser's hands, that he has become bankrupt or insolvent : (see *ante*, p. 16.) The negotiation of a bill of lading, if the party takes it *bonâ fide*, and without notice, will defeat the vendor's right to stop *in transitu* : (see 2 Steph. Com. 122, 123 ; Smith Merc. Law, 524, 531, 532, 5th edit.)

Q.—How far is payment into court to the *indebitatus* counts an admission of the cause of action ?

A.—As regards the common *indebitatus* counts, a payment into court admits that the money is due under some contract declared upon, but does not necessarily admit any particular contract, and it lies on the plaintiff to show which, if he claims a larger amount. And when *indebitatus* counts are joined with special counts, payment into court on the former does not admit allegations on the latter : (see Pat. & Mac. C. L. Pr. 913.)

Q.—Is there any difference in the effect of paying money into court where the declaration sets out a special contract ?

A.—Where money is paid in on a special declaration, or on a special count setting forth a contract, the payment admits the contract as declared on. It does not admit the plaintiff's right of action beyond the sum paid into court, and the defendant may plead a defence to other parts of the claim if it be divisible, or dispute any item of the particulars beyond the amount paid : (see Pat. & Mac. C. L. Pr. 913, 914.)

Q.—What is the effect of pleading the general issue by statute ? And what does the pleading rule on the subject require ?

A.—Such a plea puts in issue not only the defences peculiar to the statute under which it is pleaded, but all that would have arisen at common law. Accordingly, the plea of not guilty "by statute," pleaded under the 11 Geo. 2, c. 19, s. 21, in an action for excessive distress, puts in issue not only the matter of justification, but the tenancy and ownership of the goods : (see Chit. Arch. 245, 9th edit ; as to what the rule requires, see *ante*, p. 55.)

Q.—Mention some of the alterations in the law made by the Mercantile Law Amendment Act 1856. 19 & 20 Vic. c. 97—

A.—They are the following : On the breach of a contract to deliver specific goods for a price in money, the jury, by leave of the presiding judge, may find what the goods are, and, by leave of the court or a judge, execution may issue for the goods on payment of the sum found to be due for the same : (sect. 2.) It is no longer necessary that a consideration for a guarantee should appear in the writing evidencing the guarantee, as was formerly necessary : (sect. 3.) Acceptance of a bill, inland or foreign, must now be in writing, signed by the acceptor or his agent duly authorised : (sect. 6.) Merchants' accounts are now placed on the same footing with respect to the time for bringing an action thereon as other simple contract debts : (sect. 8.) Absence beyond seas, or imprisonment of a creditor, is no longer a disability : (sect. 10.) And if one of several contractors is abroad, the statute now runs against those residing here ; but a judgment obtained against those here cannot be pleaded in bar to proceedings against those abroad when they return : (sect. 10.) The provisions of the 9 Geo. 4, c. 14, ss. 1, 8, extended to acknowledgments by duly-authorised agents : (sect. 13.) Part payment by one contractor, &c. is not to take a debt out of the statute against another co-contractor, &c. : (sect. 14, 19 & 20 Vict. c. 97.)



## II. CONVEYANCING.

*Question.*—State the law of disposition by will, under the Wills Act 1857, in these cases : 1, the power of disposition of estates real and personal, acquired after the execution of the will ; 2, the effect, as to revocation, of any conveyance or act done relating to the estate disposed of (not being in itself an act of revocation,) subsequently to the execution of the will ; 3, the operation of a residuary devise on real estate comprised in a devise which fails by death, or otherwise becomes incapable of taking effect.

*Answer.*—This question may be answered from the chapter devoted to *Testamentary Alienation*.

*Q.*—State also the law in the following cases: 1, the estate created by a devise of real estate without words of limitation; 2, in case of a devise for an estate tail, where the devisee dies in the testator's lifetime, leaving issue inheritable who survive the testator; 3, in case of a devise to a child or other issue of the testator for an estate not determinable with his life, where the devisee dies in the testator's lifetime leaving issue who survive the testator.

*A.*—For the answer see the chapter on *Testamentary Alienation*.

*Q.*—State generally and briefly the purport of the act 1845, to render unnecessary the assignment of satisfied terms—what terms are declared to cease absolutely; what terms, on their becoming attendant. In taking a conveyance on sale, subject to a mortgage or charge secured by a term, which is paid off out of the purchase-money, would you, as a general rule, rely on the release of the party receiving the money, or require an assignment of the term? Give your reasons.

*A.*—See the answer given *ante*, pp. 219, 220.

*Q.*—What power is by the act of 1855 given to an infant, to make a settlement on marriage, of property real or personal, at what age, male and female respectively; and what provision is made in case of dying under age in regard to a settlement made under a power of appointment, or by disentailing assurance?

*A.*—See the answer *ante*, p. 198.

*Q.*—Explain the provisions of the act 1857, to enable married women to dispose of reversionary interests in personal estate. To what class of instruments conferring the title, in regard to their date, is the act confined? To what rights and powers beyond actual interests does the act extend, and what classes of interests are excluded from its operation?

*A.*—See the answer *ante* pp. 195, 267.

*Q.*—In regard to the acts 1856, 1858, authorising, under sanction of the Court of Chancery, leases and sales of settled estates—state the extent of the leases authorised for agricultural, mining and building purposes respectively, the authority for special provisions for building land and reservation of minerals; and what leases does the act authorise, and by what persons, without any application to the court?

*A.*—As to the power of the court to grant leases under this act, see *ante*, pp. 153, 199, 284, 285. By sect. 12 of the 19 & 20 Vict. c. 120, when land is sold for building purposes the court may allow the consideration, either wholly or partially, to be a rent issuing out of the

land: (sect. 12.) And on the sale of land the minerals may be exempted, &c. (sect. 13.) By ss. 32 and 33, tenants for life, or years determinable on lives in possession, of settled estates, and also tenants in curtesy and dower, are empowered, *without* any application to the court, to lease the estate, except the principal mansion-house and demesnes thereof, for a term of twenty-one years, which is binding on those in remainder. The lease must be by deed, and take effect in possession, and must contain all usual covenants, &c. : (ss. 32 and 33.)

Q.—Explain the provisions of the acts 1849, 1850, for remedying defects in leases under powers. What provision is made for giving validity to leases invalid by reason of deviation from the terms of the power, and what provisions for the confirmation of such leases?

A.—By the act of 1849 (12 & 13 Vict. c. 26), it is provided, that where a power of leasing is intended to be exercised, whether derived under an act of Parliament or under the instrument creating the power, and a lease has been or shall hereafter be granted, which, by reason of the non-observance or omission of some condition or restriction, or other deviation from the terms of the power, is invalid against those in remainder or reversion, &c., in case the lease has been made *bonâ fide*, and the lessee, his heirs, executors, administrators, or assigns (as the case may require) have entered thereunder, such lease is to be considered in equity as a contract for a grant at the request of the lessee, his heirs, &c. (as the case may require) of a valid lease under such power to the like purport and effect as such invalid lease as aforesaid, except so far as any variation may be necessary in order to comply with the terms of the power; and all persons who would have been bound, had the lease been lawfully granted under the power, shall be bound in equity by such contract. But it is provided that, if the persons so bound are willing to confirm the invalid lease, the lessee, his heirs, &c., shall not be entitled to any variation: (sect. 2.) And where a lease, granted in the intended exercise of a power of leasing is invalid, because the party granting it could not at such time lawfully do so, and afterwards he may lawfully do so, then the lease is to take effect as if granted when the person had the power to grant it: (sect. 4.) When a valid power of leasing is vested in any person granting a lease, and such lease, from some cause, cannot take effect and continue according to the terms thereof independently of the power, such lease, for the purposes of this act, is to be deemed to be granted in exercise of the power, although the power is not referred to in the lease: (sect. 5.) This act does not extend to any lease by an ecclesiastical corporation or spiritual person, or to any lease of any college, hospital, or spiritual foundation, or to leases before this act being invalid have been surrendered or recovered by action, &c. : (sect. 7.) By the act of 1850, the mere acceptance of rent is not to be deemed a confirmation of an invalid lease, as was provided by the act 1849 (sect. 1); but where, upon or before accepting rent under an invalid lease, any receipt or memorandum in writing confirming the lease is signed by the person accepting the rent, or his lawfully-authorised agent, such acceptance is a confirmation: (sect. 2.) Where during the continuance of the possession under an invalid lease, if the person entitled to the lands leased, subject to the lease, or to the rent, &c., is able to confirm such lease without variation, the lessee, his heirs, executors, or administrators (as the case may require), or any person who would have been bound by the lease if the same had been valid, shall, upon the request of

the person so able to confirm the same, be bound to accept a confirmation accordingly, and such confirmation may be by note or memorandum in writing, signed by the person so confirming, or his lawfully authorised agent; and after confirmation and acceptance of confirmation, such lease is valid, and has the same effect as if originally valid: (sect. 3 of 13 & 14 Vict. c. 17.)

Q.—Referring to the act to amend the Law of Real Property 1845, state the purport of its provisions under these heads, or some of them:—1, the operation of a deed of grant, feoffment, exchange and partition respectively; 2, allowing the giving of an immediate estate, or the benefit of a condition or covenant, to a person not a party; 3, the power of disposition by deed of contingent, executory and future interest; 4, the alteration of the law in regard to contingent remainders.

A.—1. The 8 & 9 Vict. c. 106, enacts that, after 1st Oct. 1845, all corporeal tenements shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery: (sect. 2.) A feoffment made after the above date, other than a feoffment made under a custom by an infant, is void at law, unless made by deed; and that a partition and exchange of any tenements or hereditaments not being copyhold, made after this date, are also void at law, unless evidenced by deed: (sect. 3.) A feoffment has no longer a tortious operation; and an exchange or a partition of any hereditaments made by deed after 1st Oct. 1845, does not imply a condition in law: (sect. 4.) 2. Under an indenture executed after 1st Oct. 1845, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture: (sect. 5.) 3. After 1st Oct. 1845, a contingent, an executory and a future interest, and a possibility coupled with any interest in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, may be disposed of by deed; but no disposition by force of this act is to bar an estate tail, and married women are to convey according to the statute 3 & 4 Will. 4, c. 74: (sect. 6.) It is also provided that a contingent remainder, existing at any time after the 31st Dec. 1844, shall be, and if created before the passing of this act shall be deemed to have been, capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened: (sect. 8; see also Browell's Real Pro. Stats. 273, 278.)

Q.—In preparing a conveyance of fee-simple lands to a man not having a wife to whom he was married before 1834, is it the best practice to convey to uses to bar dower, and with or without an express negation of right of dower, or to insert a declaration of the fact that the purchaser is either a widower or a bachelor, or has married since 1833, or to abstain altogether from notice of dower? Give your reasons.

A.—See the answer *ante* p. 147.

Q.—State in general, but accurate, terms what is a succession within the Succession Duty Act 1853, and the description of property charged; say if leaseholds are treated as real or personal property. Give an instance or instances of succession whereon the duty attaches. Say

how far the duty attaches on interests aliened before the succession takes effect. By what rule is the value of the succession measured? How does the charge affect alienees by titles arising after the duty attaches, and *that* in the cases of property, real and personal respectively, and what power is there of making separate assessments so as to discharge portions of property from the liability? If you do not answer the whole, answer some parts of the question.

A.—By sect. 2, past and future dispositions of property, whereby any person has, or becomes beneficially entitled to, any property, or the income thereof, upon the death of any person dying after the commencement of this act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation; and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the commencement of this act, to any other person in possession or expectancy, shall be deemed to confer on the person entitled by reason of such disposition or devolution a "succession." Leaseholds are treated as real property: (sect. 1.) The interest of a succession to real property is considered to be of the value of an annuity—equal to the annual value of such property during his life, or for any less period during which he may be entitled, and every such annuity is to be valued for the purposes of this act according to the tables set forth in the schedule, and the duty is to be paid by eight equal half-yearly payments: (sect. 21; see also sect. 10.) If any succession shall, before the successor becomes entitled thereto, or to the income thereof in possession, have become vested by alienation, or any title not conferring a new succession, in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created, and where the title to any succession shall be accelerated by surrender or extinction, the duty is payable at the same time, &c. as if no such acceleration had taken place: (sect. 15.) The duty imposed by this act is a first charge on the interest of the successor, and of all persons claiming in his right on real property whereon the duty is assessed, and also on the interest of the successor in personal property, while the same remains in the ownership or control of the successor, or of any trustee for him, or of his guardian, &c., or of the husband of any wife who shall be the successor; and the duty is a debt due to the Crown, having, as to the real property comprised in the succession, priority over all charges and interest created by the successor, but does not charge any other real property of the successor: (sect. 42.) But a bona fide purchaser for value, and without notice, is protected by the receipt of payment of the duty, notwithstanding any mistatement, &c.: (sect. 52.) Upon being requested, the commissioners are to make separate assessments of the duty payable in respect of separate properties, or in defined portions of the same property; and in such cases the respective portions are chargeable only with the amount of duty separately assessed; and the commissioners are empowered by their certificates to declare that any duties already assessed, whether collectively or distributively, in respect of any succession, shall thenceforth be charged, as to any unpaid instalments, according to any further distribution thereof, upon separate parts only of the property in respect of which such assessment has been made; in which case the charge of such duties shall be thenceforth limited according to such further distribution: (sect. 43.)

**Q.**—State the periods of the statutable limitation of time for enforcing claims on land after the right accrued, in case of right, to rights of common, rights of way and of water, and right to the use of light respectively.

**A.**—The 2 & 3 Will. 4, c. 71, enacts, that with respect to rights of common and all other profits or benefits to be taken and enjoyed upon land, with the exception of tithes, rents and services (which remain as at common law), where there shall have been an enjoyment of them by any person claiming right thereto without interruption for thirty years next before the commencement of any suit upon the subject, the prescriptive right is not to be taken away. Persons under disability are allowed a further time to bring their action; but no action is to be brought after sixty years' possession, which is indefeasible, unless it be shown that such possession took place under some deed or written consent. The act also provides that no action shall be brought to recover the right to any way or other easement, or any watercourse or the use of any water to be enjoyed upon or over any land or water, and the access or use of light to and for any dwelling-house, workshop and other building, after an uninterrupted possession for twenty years, except in cases of disability; and forty years' possession is to give an absolute title, unless it is shown that such possession took place under some deed or written agreement: (see Browell's Real Pro. Stats. p. 1, *et seq.*; 2 Steph. Com. 39 to 41.)

**Q.**—What is the effect of the release by an owner of rentcharge of part of the lands charged? Would the purchase of any part of the land by the owner of the rentcharge have the same effect? Is there any sound reason for continuing the existing state of the law?

**A.**—If any part of the lands out of which a rentcharge issues be released from the charge by the owner of the rent, either by an express deed of release, or virtually by his purchasing part of the land, all the rest of the land shall enjoy the same benefit and be released also. If, however, any part of the land should descend to the owner of the rent as heir-at-law, the rent shall not thereby be extinguished, as in the case of a purchase, but will be apportioned according to the value of the land, because such rent comes to him not by his own act, but by act of law: (see Will. Real. Pro. 276, 4th edit.) There seems to be no reason for continuing the present state of the law; and Lord St. Leonards has introduced a bill into Parliament which, amongst other things, proposes to alter it.<sup>(a)</sup>

**Q.**—State generally, and concisely, the provisions of the Bills of Sale Registration Act 1854; what is required to establish a bill of sale against bankruptcy, insolvency, assignment for general creditors, and execution at law or in equity? How far does a registered bill of sale affect the right in bankruptcy under the doctrine of reputed ownership?

**A.**—The 17 & 18 Vict. c. 36, enacts, that every bill of sale of personal chattels made after this act, either absolutely or conditionally, and whether or not subject to trusts empowering the grantee or holder either with or without notice, and immediately after the making of the bill of sale or at some future time, to seize the property comprised therein, and in every schedule annexed or referred to therein, or a true

(a) Since this answer was written the law has been in fact partly altered by the 22 & 23 Vict. c. 35, s. 10.

copy thereof, with an affidavit of the time when the bill of sale was given, and a description of the residence and occupation of the person giving the same, and of every attesting witness to the bill of sale, shall be filed with the official acting as clerk of dockets and judgments in the Court of Queen's Bench, within twenty-one days after the making thereof; otherwise the bill of sale, in case the person giving it become bankrupt or insolvent, or makes an assignment for benefit of creditors or in case there be an execution against his goods, will be null and void against the assignees or execution creditor. If the bill of sale be subject to any defeasance, &c., it must be written on the same paper or parchment as the bill of sale, otherwise the bill of sale is void to same extent and against same persons as if not filed. Notwithstanding the registration of a bill of sale, yet if the goods comprised in the bill of sale are in the order and disposition of the person giving it at the time of his bankruptcy, the assignees will be entitled to them on order made by the Court of Bankruptcy: (see *Prideaux's Conv.* 326, 2nd edit.; *Re Daniel*, 25 L. T. Rep. 188; *Re Levy*, 31 L. T. Rep. 270.)

*Q.*—State, in a general way, the origin, whether by common law or decision, of the rule for prevention of remoteness, under the name of the rule against perpetuities, and give, in definite terms, that rule, stating within what period, reckoning from what time executory interests, other than those in remainder after an estate tail, must vest in right, if at all.

*A.*—The rule against remoteness is, that an estate cannot be given to an unborn person for life followed by an estate to a child of such unborn child. This rule, established by numerous decisions, is apparently derived from the old doctrine which prevented double possibilities. The rule against remoteness, called the rule against perpetuities, prohibits real property from being tied up or fixed as to its future destination for a longer period than the lives of existing persons, and twenty-one years after the decease, allowing a further time for gestation if it actually exists. An executory interest or devise must also vest within the same period. The period allowed for vesting is computed in this case from the death of the testator, not the date of his will: (see 1 Steph. Com. 509, 565, n.; Will. Real. Pro. 46, 228, 262, 4th edit.)

*Q.*—Describe the restraint on accumulation of the income of real or personal property imposed by the Thellusson Act, 39 & 40, Geo. 3, c. 98. Give the extent of period for which such income may be accumulated, and say for what purposes provisions of accumulation are allowed beyond the limit imposed by the act.

*A.*—See the answer *ante*, p. 210.

### III. EQUITY AND PRACTICE OF THE COURTS.

*Question.*—Will a court of equity enforce specific performance of a voluntary agreement, whether by parol or under seal, for a settlement of real or personal estate; or will it carry into execution a settlement of real or personal estate actually vested in trustees, who have accepted the trusts?

*Answer.*—A court of equity will not enforce the specific performance of a mere voluntary contract, even if it be under seal: (see Story's Eq. Jur. § 393, b; 27 L. T. 124; Smith's Man. Eq. tit. 2, ch. 8.) But

where a voluntary conveyance is complete, so that no act remains to be done to give full effect to the title, equity will uphold it against the party making it and his representatives: (see *Smith's Man. Eq.* 192, 4th edit.) Where a trustee has been appointed and has accepted the trust, and then refuses to act, equity will compel him to perform the duties incident to that character; for, having once acted, he cannot discharge himself of the obligation: (*Goldsmith's Eq.* 197, 4th edit.; *Smith's Man. Eq.* 162, 4th edit.)

*Q.*—An intestate married since 1834 dies possessed of real as well as personal estate, leaving a widow, a son, and several other children; what are their respective rights and interests in the intestate's property?

*A.*—See the answer *ante*, p. 215.

*Q.*—What is necessary to give validity to the will of a married woman?

*A.*—Nothing more is necessary to give validity to the will of a married woman of such property as she can devise or bequeath than is necessary to the will of any other person. The property she can so will is fully stated *ante*, p. 203.

*Q.*—What operation has a clause against anticipation upon a gift of the income of real or personal estate to a woman who is unmarried at the time of the gift, afterwards marries, and then becomes a widow?

*A.*—See the answer *ante*, pp. 194, 266.

*Q.*—What is the mode of proceeding when a trustee is desirous of paying money or transferring stock into court under the Trustee Relief Acts?

*A.*—See the answer *ante*, p. 237.

*Q.*—What are some of the principal matters which are the subject of applications to the judges in chambers?

*A.*—See the answer *ante*, pp. 299, 300.

*Q.*—What covenants would be inserted by a court of equity in a lease of a dwelling-house in pursuance of a contract for a lease subject to "usual covenants"?

*A.*—The covenants inserted in such case would be: covenants by lessee to pay rent and taxes (except land-tax), and to paint and repair (except in cases of fire); not to suffer any trade to be carried on; to insure; (and perhaps) not to assign without licence, and to surrender at the end of the term. Also covenants by the lessor for quiet enjoyment: (see *Arch L. & T.* 41, 62, 63, 2nd edit.)

*Q.*—By what instruments can a father appoint guardians of his children, and what are the ordinary powers and duties of guardians?

*A.*—See the answer *ante*, p. 261.

*Q.*—Will the court, under any, and what, circumstances, during the lifetime of a father, order the income of a fund belonging to his infant child, to be applied for his maintenance?

*A.*—See the answer *ante*, p. 262.

*Q.*—Have the town agents of a country solicitor any, and what, lien upon the papers in their hands belonging to the clients of the country solicitor?

*A.*—The town agent of the attorney in the country has no lien for his *general* balance upon papers of the client which come into his hands;

but he has a particular lien to the extent of his charges in the suit or matter in which he has been the agent for the country client.

Q.—What are some of the ordinary cases in which the court will appoint a receiver *pendente lite*?

A.—See the answer *ante*, p. 276.

Q.—What is the general test of the plaintiff's right to an order for production of documents in possession of the defendants?

A.—See the answer, p. 318, 319.

Q.—Under any, and what, circumstances will the court permit the bidding at a sale under the court to be opened?

A.—See the answer *ante*, pp. 282.

Q.—Explain the mode of administering an insolvent estate, as between specialty and simple contract creditors, where the assets are partly legal and partly equitable.

A.—In administering an estate in equity where the assets are equitable they are administered *pari passu* amongst all creditors, without regard to priority of debts, on the maxim that equality is equity, and if the funds fall short, all creditors must abate in proportion: (Story's Eq. Jur. §§ 552, 554; and see Smith's Man. Eq. Jur.) But where the assets to be administered are legal, the creditors are paid according to their legal priorities, even in equity: (see *ib.*)

Q.—What are the usual trusts of a settlement of the property of a ward of court on her marriage with a gentleman who brings little or no property into settlement?

A.—If the gentleman marrying the ward have no fortune or property of his own, the court will not allow him to touch any of her property, but will require the whole to be settled upon her; although it may, and often does, empower the wife, under the settlement, to give one-fifth of the property to her husband by will: (see Goldsmith's Eq. Pr. 155, 4th edit.) The wife always has the first life estate; but the court has power to give to the husband the property for his life after the decease of the wife, and special provisions in favour of the children according to the nature of the property, and lastly a power of appointment to the wife if she survives and there is no issue.

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# APPENDIX A.

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## INTRODUCTION.

THE publication of the present edition of this Digest was delayed some time, awaiting the issue of the Consolidated Chancery Orders then in course of preparation. But, having been informed in October last, through the courtesy of one of the gentlemen engaged in the preparation of the orders, that it might be some time before they were issued, and that when issued they would make very little alteration in the then existing practice of the Court, it was determined to bring out the work at once, and note any alterations made by the Orders when issued, by way of appendix. This we have now done; and for the purpose of making the alteration as clear as possible, we have, in most instances, not only rewritten the Answers but the Questions also. It will be seen that the principal alterations are as to the time for answering.

The new Orders take effect, and are in force from and after the 14th February, 1860.

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Page 261, line 20, and page 270, line 4, for "one of the solicitors to the suitors' fund," read "one of the solicitors of the court:" (Consol. Orders, ord. 7, rule 3.)

Page 292, lines 8, 9, for "threatening an attachment," read "stating the plaintiff may enter an appearance for the defendant, that he is liable to be arrested and imprisoned and to have a decree made in his absence:" (Consol. Order 9, rule 2.)

### *Page 302.*

*Q.*—How is an appearance enforced?

*A.*—In the answer to this question after the words "the plaintiff may," add "by special leave of the court." The answer will then read, "if the defendant, after being served within the jurisdiction of the court with a copy of the bill, duly indorsed, &c., does not appear thereto within eight days, the plaintiff may, by special leave of the court, issue an attachment against him. Or," &c.: (see Consol. Order 10, rule 10.) Before this order the attachment issued without order.

### *Page 305.*

*Q.*—Within what period must a defendant, required to answer, put in his plea, answer, or demurrer?

*A.*—A defendant required to answer a bill, whether original or amended, must put in his plea, answer, or demurrer thereto, not

demurring alone, within *twenty-eight days* from the delivery to him or his solicitor of a copy of the interrogatories, which he is required to answer : (see 37th of Consol. Orders, rule 4.)

Q.—Is it competent for a defendant not required to answer a bill to put in his plea, answer, or demurrer thereto ; and, if so, within what period must this step be taken ?

A.—A defendant not required to answer a bill, may, without leave of the court put in his plea, answer, or demurrer, not demurring alone, within fourteen days after the expiration of the time within which he might have been served with interrogatories for his examination, in answer to such bill : (37th Consol. Orders, rule 5.) The plaintiff *might* have served the defendant with interrogatories at any time within eight days after the expiration of the time limited for the defendant to appear, viz., eight days after the service of the copy bill. Therefore, the defendant may put in a voluntary answer if he has appeared in due time, on the expiration of eight days from his appearance, if not served with interrogatories during the eight days.

*Pages 305, 306.*

Q.—What is the last day which the defendant has for putting in an answer to the amendments of a bill before a replication can be filed, where the plaintiff has amended on the terms of not requiring a further answer ?

A.—We cannot find any proper answer to this question in the Consolidated Orders ; it should, therefore, with its answer, be struck out.

*Page 307.*

Q.—When must a plaintiff, who has delivered exceptions to a defendant's answer for insufficiency, obtain an order to set down for hearing such exceptions, if the bill be for an injunction ?

A.—The 15th Order of November 1850, which furnished the answer to this question not having been incorporated in the Consolidated Orders, this question and answer should be struck out.

*Page 307.*

Q.—When a defendant is required to put in a further answer, in consequence of exceptions to his first answer having been allowed or submitted to, what time is he allowed to put in his further answer ?

A.—In the third line in the answer to this question, for “three weeks” substitute “fourteen days :” (see 16th Consol. Order, rule 9.) The time is by this order curtailed ; the defendant only being allowed fourteen days to put in a further answer, where he submits *before* the plaintiff has set down the exceptions.

CLAIMS.

In any part of this Digest, where claims are mentioned, the learned student must remember that “no claim shall be filed after the 14th day of February, 1860 :” (Consol. Order 8, rule 4.) But “the practice peculiar to claims shall continue in force with respect to claims filed, or to be filed before the 16th day of February, 1860 :” (Preliminary Order, rule 4.)

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## ERRATA ET ADDENDA.



Page 208, line 29, after the words, "would it be the same if the testator," add  
"after making his will."

211. First answer in this page. Reference should have been made by this answer to the case of *Edwards v. Hall*, 25 L. J., Ch. 82; 4 W. R. 111, from which it seems that shares in incorporated companies holding lands are not within the Statute of Mortmain.
271. First answer in this page. On this subject, Mr. Smith, in his Chancery Practice, says, "A foreign state, if recognised by this Government, is entitled to the aid of this court; but it must sue in the *names of some public officers*, who are entitled to represent the interests of the state, and upon whom process can be served on the part of the defendants:" (p. 78, 5th edit., citing *The Columbian Government v. Rothschild*, 1 Sim. 104.)

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